

1-1955

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Recommended Citation

Jacobus tenBroek, *California's Adoption Law and Programs*, 6 HASTINGS L.J. 261 (1955).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol6/iss3/1

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CALIFORNIA'S ADOPTION LAW AND PROGRAMS†

By JACOBUS TENBROEK*

*Lo! In the Orient when the gracious light
Lifts up his burning head, each under eye
Doth homage to his new-appearing sight,
Serving with looks his sacred majesty,
And having clim'd the steep-up heavenly hill,
Resembling strong youth in his middle age,
Yet mortal looks adore his beauty still
Attending on his golden pilgrimage;
But when from highmost pitch, the weary car,
Like feeble age, he reeleth from the day,
The eyes, 'fore duteous, now converted are,
From his low tract and look another way:
So thou, thy self out-going in thy noon,
Unlook'd on diest, unless thou get a son.††*

I. Introduction

Recent developments in California's adoption programs affecting both agency and independent placements, have thrown those programs into a state of flux. The number, character and variety of bills before the Legislature upon the subject, bespeak the turmoil in the field.

On October 15, 1954, the State Supreme Court handed down its decision in the *McDonald* case.¹ In holding that agency "consent" is not necessary to the granting of an adoption petition for a child relinquished to the agency, the court overturned an administrative practice of twenty years' standing. In the opinion of citizen and professional workers in the field of child welfare, the impairment to agency operations is serious. The agency authority and role in the adoption of children committed to them, say these workers, is not now commensurate with their full responsibility for the interim care of the child and their exclusive duty to make his adoption placement.

† For their invaluable assistance in the preparation of this article, the author is indebted to: Lucile Kennedy, Chief, Division of Child Welfare; Bessie C. Irwin, Supervisor, Bureau of Adoptions; Verne E. Gleason, Administrative Assistant; Philip Keller, Chief, Bureau of Research and Statistics, all of the California State Department of Social Welfare; Richard Mayers, Deputy Attorney General; Irene Velasko, Supervisor, Alameda County Probation Department; Lorenzo Buckley, Alameda County Probation Department.

The publication of this paper was made possible by a generous grant from Mr. Elmer E. Skinner of San Francisco.

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†† WILLIAM SHAKESPEARE, SONNET No. 7.

¹ In re Adoption of McDonald, 43 A.C. 453, 274 P.2d 860 (1954).

The Attorney General's 1953 ruling — The other major focus of disturbance in the adoption field — has elicited reactions from some quarters which are far less temperate. Responding to a question put by the Director of the State Department of Social Welfare, the Attorney General read Welfare and Institutions Code Section 1620b and Civil Code Section 224q as criminally forbidding all unlicensed adoption placements not made directly and personally by the parents. He thus found to be illegal and subject to penal sanction the practice — commonly engaged in by physicians, attorneys, ministers, nurses, and other friends, acquaintances and consultants of the biological parents — of serving as third-party intermediaries who actually find or select the adoptive couple and place the child with them.

"This thing of the Attorney General's," said one attorney and member of the State Assembly, "I consider a gratuitous insult to the conscientious members of the medical profession and conscientious members of the legal profession. It is a sorry day when doctors and lawyers cannot use the intelligence and the judgment that they have acquired over years of training and experience to the best of their ability, even in matters of this kind, and to be, because of some gimmick, forced to use evasive practices in order to carry out what I consider to be a very legitimate and a very high principled activity of members of the Bar and members of the medical profession."²

Resolutions were passed by the House of Delegates of the State Bar Association and by the California Medical Association urging the Legislature, in the words of the latter, "to clarify the adoption laws by adding a section thereto specifying that the parent of a child has the right, in presenting the child for adoption, to act through her attorney or her physician, or both, and to have legal counsel and medical assistance, in this field as in all others; "

A representative of the California Medical Association, appearing before the Assembly Committee on Judiciary pleaded. "I can say that we wish clarifying legislation so we all won't be looked upon as criminals for assisting a mother in arranging an adoption."³

The matter "boils down," testified one attorney with a large adoption practice, "to a case of interprofessional rivalry," between the doctors and the lawyers on the one hand and the social workers on the other.⁴ If so, said a prominent welfare administrator who is also a lawyer, attorneys

² *Hearings*, Assembly Committee on Judiciary 112 (Nov. 1954).

³ *Hearings*, *id.* at 134. See also the statement of the representative of the California State Bar Association at 72.

⁴ *Id.* at 78.

should "confine their adoption activities to matters of giving legal advice and representing their clients in court. . . To . . . place the responsibility upon attorneys to engage in social work practices and to place children for adoption, introduces a novel and illegal function in the practice of law." " . . . the conducting of social investigations, the making of social studies, and the placement of children for adoption" are the proper functions of social workers.⁵

"The question is not whether," said still another attorney, "doctors should practice medicine, lawyers law and social workers should practice social work. The question is whether all of the parties involved [in an adoption] are more adequately protected in an agency adoption than in one arranged by a doctor or lawyer or any one else."⁶

In this period of flux, agitation and movement, it seems especially important and appropriate to attempt an overall review of California's adoption law and programs. The present article essays that task.

II. *Special Adoptions — Adult, Stepparent, Conduct*

The California Civil Code provides for five types of adoptions: 1) adoption of an adult by an adult; 2) adoption by a stepparent of a child which is in the custody and control of his spouse as its natural or adoptive parent; 3) adoption by the biological father of his illegitimate child; 4) so-called independent or direct adoption, in which the biological parent or parents select adoptive parents, place the child with them and consent to the adoption by them; 5) so-called relinquishment or agency adoption, in which the biological parent or parents turn the child over to a licensed adoption agency, execute and deliver to the agency a general relinquishment of rights and responsibilities and in which the agency then selects the prospective adoptive parents and places the child with them.

Adult Adoptions

The adult adoption provision was added to the Civil Code in 1951.¹ Under it, "Any adult person may adopt any other adult person younger than himself, except the spouse of the adopting persons, by an agreement of adoption approved by a decree of adoption of the Superior Court of the county in which either the person adopting or the person adopted resides. The agreement of adoption shall be in writing and shall be executed by the person adopting and the person to be adopted, and shall set forth that the parties agree to assume toward each other the legal relation of parent and

⁵ Letter of Director, Department of Social Welfare to California State Bar, June 14, 1954.

⁶ *Hearings*, *supra* note 2 at 79.

¹ CALIF. CIV. CODE § 227p.

child, and to have all of the rights and be subject to all of the duties and responsibilities of that relation." The consent of the spouse of the adopting and adopted persons must be secured (if they are capable of giving consent) but no parental or other consent is necessary. Investigation and report to the court by county probation officer or the State Department of Social Welfare is not required but may be called for by the court. The court is directed to "withhold approval of the agreement and deny the petition" unless it "is satisfied that the adoption will be for the best interests of the parties and in the public interest, and that there is no reason why the petition should not be granted."

How the superior courts will exercise the sweeping discretionary power thus vested in them, by what standards they will decide whether the adoption is "for the best interests of the parties and in the public interest," whether they will require an affirmative showing that the adoption is "in the public interest" as the language precisely requires or will allow the last of the three required elements in effect to displace the other two and grant petitions if they see "no reason" why they should not do so, the circumstances in which and the motives for which persons will seek consummation of such adoptions — all these questions remain unanswered by the limited experience under the section.² During the first nine months of operation of the section, the State Department of Social Welfare received notice of the filing of 152 petitions. Fifty-eight of these involved adoptions by stepparents.³ In fiscal year 1953-1954, 124 adult petitions were filed, 40 of which represented adoption by stepparents.⁴

Of thirteen adult adoptions referred by the court to the Alameda County Probation Office in 1954 for investigation and recommendation, seven were stepparent adoptions, the majority of which could not be consummated during the person's minority because of refusal of a biological parent to give his consent. Some were unaware of the adoption law as it related to stepparents, and only when they attempted to insure the stepchild's succession to an estate did they realize legal adoption was necessary. Five referrals indicated a desire on the part of the petitioner to give security to the person adopted. A bond of affection existed between them and the petitioner wished to protect the person adopted against the claims of relatives at time of inheritance. The ages of the persons adopted ranged from twenty-

² The SDSW has received few requests from judges for investigation of reports.

³ BIENNIAL REPORT, SDSW 79 (1950-1952).

⁴ These data are compiled from notices of adoption petitions received by the State Department of Social Welfare. Since CALIF. CIV. CODE § 227p does not make the sending of such notices mandatory upon the county clerks, the number of adult adoption petitions filed may be higher than the figures given here.

three to forty-four years and of the person adopting thirty-eight to seventy years. The seventy-year old had petitioned to adopt a person who had been in her home since infancy as a foster child. They had taken their relationship for granted until the petitioner suddenly realized that she needed to take steps to insure the inheritance rights of her foster child. In no case did the court specifically request an investigation and recommendation as to whether adoption was in the public interest.⁵

Of the three adult adoptions referred to the State Department of Social Welfare for investigation and report: The first was a petition for the adoption by an older man of a thirty-two year old woman, a close friend of the petitioner's daughter. The second case involved a petition for the adoption of a forty-three year old married man by an older couple living in another state. The man had been taken into the home of the couple when a boy, following the separation of his parents and his desertion by his own father. At the time the petition was filed, the man was contributing to the support of his aged biological father who was receiving Old Age Security in California, and it was questioned whether the purpose of the adoption was to escape this liability. The third case involved an older woman who was reported to be very erratic and alienated from members of her own family, including a stepson and an adopted daughter. She petitioned to adopt a married couple who had been in her employ for several years. The petitioner was well to do and there was some thought in the community that the couple might be attempting to get as much as possible from her.⁶

Even though the numbers of such adoptions becomes substantially greater, and regardless of whether the courts adopt a restrictive or expansive interpretation of the section, the social interest in adult adoptions and the problems involved in the administration of the program are quite different from the social interest and problems involved in the program for the adoption of minors and particularly infants.

Stepparents Adoptions

The general provisions of the Civil Code governing the adoption of minors apply to stepparent adoptions. As the result of certain historical

⁵ Letter from the Alameda County Probation Department to the author, January 14, 1955.

⁶ Letter from the Supervisor, Bureau of Adoptions, SDSW, to the author, Dec. 28, 1954. Other possible cases falling under the adult adoption law are indicated by the Bureau of Adoptions. "We recall one case in which a family of several children were being adopted by the foster parents with whom they had been living for a long time. However, the oldest child had passed his twenty-first birthday and the petition had to be denied as far as he was concerned. There was some question on the part of the other children as to whether they wished to be adopted if their older brother could not. We also recall several other instances in which petitions were filed when the child was almost twenty-one and the study and report had to be hurried through in order that the case could be heard before the twenty-first birthday."

factors, however, stepparent adoptions are handled by a different administrative setup from that employed in other adoptions. Civil Code Section 227a provides: "The probation officer in the county in which the action for adoption is pending shall make an investigation of each case of adoption by a stepparent where one natural parent retains custody and control of the child. No order of adoption shall be made by the court until after such probation officer shall have filed his report and recommendation and the same shall have been considered by the court. Civil Code Section 226 provides: "In case of an adoption of a child by a stepparent where one natural or adoptive parent retains his or her custody and control of said child, the consent of either or both parents must be signed in the presence of a county clerk or probation officer of any county of this State on a form prescribed by the State Department of Social Welfare and the county clerk or probation officer before whom such consent is signed shall immediately file said consent with the clerk of the superior court of the county where the petition is filed and said clerk shall immediately file a certified copy of such consent to adoption with the State Department of Social Welfare." Civil Code Section 226 in requiring the consent of the State Department of Social Welfare or a licensed county adoption agency if the father or mother signs consent outside the state, adds that such consent is not necessary "where the adoption is by a stepparent and one natural parent retains custody and control of the child."

When the 1927 amendments to Civil Code Section 226 were passed requiring State Department of Social Welfare investigation of all adoption petitions, stepparent adoptions were included in the general language. In 1931, at its own request, the State Department of Social Welfare was relieved of investigative and reporting responsibility in stepparent cases. It had found that almost all of the 425 stepparent petitions investigated in the two years 1928-1930 had been favorably recommended and that the time of its limited staff could be better spent on actual placement cases.⁷

In 1933 the Civil Code was changed to make investigation and report of stepparent adoptions the responsibility of county probation officers. In fact, the amendment provided that the court could not grant the petition

⁷ *Report of the California Adoption Survey Committee*, 3 (1946) The Department's stepparent investigations had also revealed that injustice sometimes resulted from section 224 of the California Civil Code which at that time provided that the consent was not necessary "From a father or mother adjudged guilty of adultery or cruelty and for either cause divorced." The Department, as a matter of policy, notified both divorced parents of pending adoption petitions, regardless of the ground of divorce. The parent not having custody and whose consent was not necessary to the adoption often had serious objections to it based on a genuine interest in his child. In 1931, Civil Code section 224 was therefore amended to delete the language above quoted.

without a favorable recommendation from the probation officer. "The probation officer in the county in which the action for adoption is pending," said Civil Code Section 227a, "shall make an investigation of each case of adoption by a stepparent. No order of adoption shall be issued by the court until after favorable recommendation thereon is made by such officer." This rather anomolous provision that an officer of the court could bar action by the court remained in effect until 1943 when the present language was enacted forbidding the making of a stepparent adoption order by the court "until after such probation officer shall have filed his report and recommendation and the same shall have been considered by the court." In 1945, the State Department of Social Welfare was relieved of responsibility for investigation and report when one of the petitioners is an adoptive parent. In that year also, Civil Code Section 227a was amended to require probation officer investigation of stepparent cases only "where one natural parent retains custody and control of the child."

The difference between and among the various paragraphs of Civil Code Section 226 and Section 227a resulting from the amendments of 1945 — sometimes referring to a child in the custody and control of a natural parent, sometimes of a natural or adoptive parent — remains in the law to the present time. Civil Code Section 227a, requiring probation officer investigation of stepparent adoptions, does so "where one natural parent retains custody and control of the child" whereas unnumbered paragraphs 1, 3 and 5 of Civil Code Section 226, excluding stepparent adoptions from the responsibility of the State Department of Social Welfare, do so "where one natural *or adoptive* parent retains control and custody of the child." [Italics added.] The State Department of Social Welfare is thus divested of a larger responsibility than that vested in the probation officers. And, on a literal reading of Civil Code Sections 226 and 227, neither department is responsible for investigating and reporting upon stepparent adoptions in which the child remains in the custody and control of an adoptive rather than a natural parent. Civil Code Section 227a is, in this respect, also divergent from unnumbered paragraph 8 of Civil Code Section 226, requiring parental consent to be signed in the presence of a county clerk or probation officer in stepparent adoptions "where one natural or adoptive parent retains his or her custody and control of said child."⁸

In the fiscal year 1953-1954 there were 2,764 stepparent adoptions in California, 32.8 per cent of the total number of adoptions. As in the case

⁸ Unnumbered paragraph 9 of Civil Code section 226, dealing with state department or county agency consent when parental consents are signed outside the state, excepts stepparent cases in which "one natural parent retains custody and control of the child."

of other adoptions, stepparent adoptions have increased phenomenally in the past fifteen years.

1939-1940	423	1947-1948	1980
1940-1941	512	1948-1949	2135
1941-1942	860	1949-1950	2044
1942-1943	1366	1950-1951	2502
1943-1944	1622	1951-1952	2515
1944-1945	1527	1952-1953	2585
1945-1946	1699	1953-1954	2764
1946-1947	1742		

Stepparent adoptions have few of the features and almost none of the problems of ordinary adoptions. The children are generally older than in cases of adoption by non-relatives; in fact, they are most often not infants.⁹ Their birth status is a socially acceptable one, i.e., they were born in wedlock.¹⁰ There is no problem of finding a home and placing the child in it; he is already there. A determination of the suitability of the adoptive home is virtually meaningless. The child is with one natural parent who has the right of custody and control; and that natural parent is married to and living in the same household with the stepparent. A denial of the adoption petition does not result in the removal of the child from the home, whether adjudged suitable or not. The reasons for adoption are not the social protection of the child or providing him with a family and home. These he already has. The reasons for adoption are legal and financial, to endow the parent-child relationship with a legal status and attendant rights and duties, entitling the child to such rights as guardianship, inheritance, support, and the name and status in the family that he would have had if he had been born to both parents, and entitling the stepparent to rights of custody, control, services and earnings. In this sense, the effect of a stepparent adoption is to legalize an already existing family relationship, not to establish a new one.

The administrative separation of stepparent adoptions from other adoptions, while it may be explained historically, can hardly be justified other than in terms of maintaining the status quo of existing staffs and work loads. The State Department of Social Welfare has no direct responsibility in stepparent cases unless the general duty to study the operation of the law and recommend changes in it be considered such. Superior court clerks are obligated to file certified copies of consents taken in stepparent adoption cases by county clerks or probation officers with the State Department of Social Welfare; and such consents are to be on the forms prescribed by

⁹ FEDERAL SECURITY AGENCY, ADOPTION OF CHILDREN, CHILDREN'S BUREAU, STATISTICAL SERIES No. 14, 4 (1951).

¹⁰ *Ibid.*

the state department.¹¹ The state department has no power to approve or disapprove, to accept or not to accept such consents. County clerks are also required to notify the state department of all official actions in adoption cases including stepparent adoptions.¹² All substantial administrative responsibility, however, for the handling and processing of stepparent adoptions rests with the county, primarily through the county probation department. The probation officer must investigate each case and make a report and recommendation which are prerequisite to final judicial action.¹³ Moreover, this is not a delegated function from the state department as it is with county and private adoption agencies. It is conferred directly by the law.¹⁴ Yet adoptions are a part of a larger program of child welfare services. Much of that larger program is supervised and administered by and through the State Department of Social Welfare. Stepparent adoptions, though quite different from ordinary adoptions, are equally a part of that larger program. They are more properly classified as problems of dependent children than as problems of delinquent children as is true under existing arrangements.¹⁵

Conduct Adoptions

Section 230 of the Civil Code, dealing with the adoption of an illegitimate child by his natural father, was originally placed in the Code in 1872 and has remained intact ever since. It provides that: "The father of an illegitimate child, by publically acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from time of its birth." The other provisions of the code chapter dealing with adoption "Do not apply to such an adoption."

Eighty-two years of judicial application of this section have produced

¹¹CALIF. CIV. CODE § 226, unnumbered paragraph 8.

¹²CALIF. CIV. CODE § 226, unnumbered paragraph 1: "Any person desiring to adopt a child may for that purpose petition the superior court of the county in which the petitioner resides and the clerk of the court shall immediately notify the State Department of Social Welfare at Sacramento in writing of the pendency of the action and of any subsequent action taken."

¹³CALIF. CIV. CODE § 227a.

¹⁴*Ibid.* The Attorney General of California has ruled that in an adoption by a stepparent where neither natural parent retains custody or control, in case of dissolution of marriage by death or divorce, the investigation and report on the petitioner is the responsibility of the State Department of Social Welfare under Sections 226 and 227a of the California Civil Code. NS-5323, 3 Ops. Atty. Gen. 129 (1944).

¹⁵Another area in which there is duplication and overlap in the functions of the county probation departments and the county and state welfare departments is that of the foster care program in which some dependent and neglected children who are wards of the juvenile court are committed by such court to the care of the probation department.

a sizable body of interpretation, not always harmonious and consistent. The number and character of the elements prescribed to establish this form of adoption — illegitimacy, paternity, public acknowledgment by the father, reception into his family, consent by his spouse given with knowledge of the illegitimacy, other treatment by him of the child as legitimate¹⁶ — involving as they do not simply a single public act or declaration of recognition or a duly recorded formal proceeding but a whole course of conduct made up out of the acts and conversations of daily living, not only create difficult evidentiary and interpretative problems for judges but also for persons seeking to show that adoption occurred.¹⁷

Reversing an earlier decision,¹⁸ the California Supreme Court held, in 1945, that the benefits of Civil Code Section 230 were available, not only to minors, but to all persons born illegitimate "whether they be minors or adults and whether the acts essential to effectuate their legitimation occurred during their minority or later."¹⁹ In 1951 the Legislature wrote this judicial conclusion into the law by amending Civil Code Section 221 to provide that "In Sections 228, 229, and 230 'child' and 'children' include both minor persons and adult persons."²⁰

The California Supreme Court has drawn a line of distinction between adoptions under Civil Code Section 230 and ordinary adoptions. "the verb 'adopts'," it said, "as used in Sec. 230 of the Civil Code, is used in the sense of 'legitimizes,' and the acts of a father of an illegitimate child if filling the measure required by that statute, would result, strictly speaking, in the legitimation of such child, rather than in its adoption. Adoption,

¹⁶ *In re Floods Estate*, 217 Cal. 763, 21 P.2d 579 (1933), *Laugenour v Fogg*, 48 Cal.App.2d 848, 120 P.2d 690 (1942).

¹⁷ The California Supreme Court decisions reveal a great deal of judicial confusion about the meaning of each of the principal requirements for adoption under Calif. Civ. Code Section 230. How public must a public acknowledgment be? Are acts sufficient or must there be declarations and if so to whom? Can a single person without relatives or fixed abode meet the reception into the family requirement? Can such reception occur in an illicit relationship family? Must the consent of the wife be secured even though she is not a part of the family? For a presentation and discussion of the confused holdings on these questions see *ARMSTRONG, FAMILY LAW*, 925 ff. (1953).

¹⁸ *Estate of Pico*, 52 Cal. 84 (1877).

¹⁹ *Estate of Lund*, 26 Cal.2d 472, 159 P.2d 643 (1945)

²⁰ In *Estate of Lund*, the California Supreme Court held that Civil Code Section 230 is complied with although the legitimating acts actually take place in other states while the father and his family are domiciled there and these states do not authorize legitimation. "We are satisfied," said the court, "that the public, unconditional, and long-continued acknowledgment of a child by his father, with full knowledge of the facts, accompanied by reception of the child into the family and treatment as a legitimate child, constitutes a continuing representation which by its nature is inherently permanent and continuing and goes with the father wherever he goes" 26 Cal.2d 472, 496, 159 P.2d 643, 656 (1945).

properly considered, refers to persons who are strangers in blood; legitimization, to persons where the blood relation exists."²¹

The distinction is not altogether accurate. Adoption proceedings under Section 226 of the Civil Code are available to blood relations, including natural parents.²² In fact, if a child has been lawfully adopted by strangers or judicially declared free of the custody and control of the parent, proceedings under Civil Code Section 226 are the only method by which the natural parent may establish or re-establish the legal relation of parent and child.²³ An unwed mother may have the rights to custody and control but go through an adoption under Civil Code Section 226 as a means of publicly establishing the parent-child relationship while keeping the community from knowing that the child is her natural offspring.²⁴ A mother who later

²¹ *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 916 (1892), *In re Navarro*, 77 Cal. App.2d 500, 175 P.2d 896 (1947).

²² A twenty-five state study by the United States Children's Bureau indicates that one per cent of all adoption petitions are filed by biological parents of the child to be adopted. *STATISTICAL SERIES* No. 14, *supra* note 9, Table 3 at 13.

²³ See for example, No. 29966 and No. 27446, consolidated, Superior Court, Butte County, (1952). Abandonment proceedings had been completed and a decree entered under Section 701, California Welfare & Institutions Code, with respect to the three children in question. Three adoption petitions were filed: One by a couple in whose home one of the children had been placed by the county probation department; one by another couple with whom the two other children had been placed; and the third by the natural mother and stepfather. "The practical effect," of the abandonment decree, said the court, "is that, for better or worse, the mother appears herein along with her husband, a step-father, as strangers in petitions counter to petitions of foster-parents, also strangers, for the adoption of the children." In this situation the natural parent was placed on the same legal footing as the other petitioners subject as they were under Civil Code Section 226 to investigation, report, determination of suitability of the home and the like. The judge conceded that "the tie of blood would weigh the scales in favor of the mother's petition," "if as between the petitioners all things appeared fairly equal in devotion to the children (and reciprocated devotion of child for parent), and the moral, cultural and physical advantages offered by the respective petitioners . . ." "However," continued the court, in the Memorandum of Decision, "any equities in favor of the mother arising out of the circumstances disclosed by the testimony can be now adjusted only if the welfare of the children would coincide with her present wishes. If the legislative intent was that Section 701, Welfare Code, would not have such unhappy result, then revision of the section or of Civil Code Section 224 is necessary. While parental rights should be accorded great respect and sanctity, a like respect for and sanctity of judgments regularly entered is necessary to the orderly administration of the law." Weighing the testimony and reports submitted and looking at the three homes comparatively, the judge decided that the best interests of the children would be served by granting the petitions of the two sets of foster parents and denying the petition of the natural mother and stepfather. In doing so the judge also rejected the recommendation of the State Department of Social Welfare that the petition of the foster parents having the two children should be denied and the children returned to the natural mother and stepfather.

²⁴ The records of the SDSW reveal that in this instance the petition for adoption was granted. *Cf. Marshall v. Marshall*, 196 Cal. 761, 765-767, 239 Pac. 36, 37 (1925), where the California Supreme Court said: "Our Civil Code provisions respecting adoption contain no definition of the term, but all of the definitions seem to be in substantial agreement to the effect that it is the act by which relations of paternity and affiliation are created and recognized

marries a man not the father of her child may join with the stepfather in a petition for adoption as a device for keeping the child from eventually figuring out that it was born out of wedlock.²⁵ Moreover, the natural father of an illegitimate child may wish to resort to adoption under Civil Code 226 in the interest of giving the child's status the certainty derived from formal proceedings rather than leaving it dependent on the difficulties of proof of compliance with all of the requirements of Civil Code Section 230.²⁶

But while the difference between blood relations and strangers does not, in and of itself, deserve the weight given it in the quoted passage, it does point to a valid distinction which the court apparently had in mind: The object and effect of Civil Code 230 is to attribute to certain conduct of the natural father the legal significance of changing the status and capacity of an illegitimate child to the status and capacity of a child born in lawful wedlock, the primary object and effect of adoptions under Civil Code Section 226 is to secure homes and parental relationships for children without any regard to their legitimate or illegitimate birth. There is no provision in Civil Code Section 226, such as is contained in Civil Code Section 230, that, upon adoption, an illegitimate child is "deemed for all purposes legitimate from the time of its birth." Civil Code Section 226 simply does not deal with the problem of illegitimate status (though many of the children adopted under it are illegitimate) whereas Civil Code Section 230 is geared to deal with one phase of that problem. Accordingly, Civil Code Section 230 not only makes a child so adopted by the natural father "for all purposes legitimate from the time of its birth" but it frees the process of adoption from the "limitation express or implicit in ordinary adoption proceedings."²⁷

Since Civil Code Section 230 is in fact a provision for legitimation by paternal conduct, the judicial construction of the section reflects and embodies social attitudes towards illegitimacy. As long ago as 1889, Chief Justice Beatty of the California Supreme Court expressed the view that Civil Code Section 230 was "remedial in nature designed to secure to innocent unfortunates a just share of the rights to which they are by nature as fully entitled as are legitimate offspring in cases of this kind

as legally existing between persons not so related by nature or by law. In other words, it is a proceeding by which the adopting parent assumes a parental relationship toward the child of another. It seems unthinkable that one who is both the natural mother and the legal mother of a child can legally adopt such child. The natural mother of a child could legally adopt such child only in a case wherein her parental relationship had theretofore been severed as a matter of law. "

²⁵ The petition was also granted in this case.

²⁶ The State Department of Social Welfare lays some emphasis upon the desirability of fathers using Civil Code Section 226 in its Adoption Manual Sections 2070-00 D.C.

²⁷ Lund, *supra* note 19 at 493, 159 P.2d at 654.

the only strictness required is in proof of paternity. That being satisfactorily established by plenary proof, . . . courts should lean strongly in favor of a finding that the father of an illegitimate child has done what every honest and humane man should be not only willing but eager to do, and what a just law would compel the unwilling to do."²⁸ It is notable that this view, however, was expressed in a dissenting opinion. A much more common opinion, then and later, on and off the bench, has been that the illegitimacy of children has a salutary bearing on the morality of adults and that as a matter of social policy legitimation should be made difficult. In 1942 Judge Parker wrote in the *Laugenour* case: "The argument is that when the father of an illegitimate child severed his relations with his lawful wife he then became a man without a home of any kind with the right to re-establish a home elsewhere with whom he chose and under whatever conditions he chose. This, too, regardless of the laws governing divorce and a separation. It is a strange contention and if adopted would mean the end of what we have heretofore deemed the backbone of any civilized country to wit, the home and family. . . . If the rules are relaxed or misconstrued to the extent here sought we will unsocialize our system beyond description. The terms 'home' and 'family' will have no meaning other than designating sheltered centers for sex promiscuity."²⁹

In recent years, judicial and probably popular opinion too have come to a fuller recognition of the injustice and futility to heaping punitive consequences upon offspring for disapproved conduct in their natural parents. We are still a long way from the desired goal of treating "*all* children (however conceived and born) on a legal and social parity with each other" "for *all* purposes and under *all* circumstances."³⁰ But rhetoric and holdings in some recent California cases dealing with legitimation represent progress in that direction. ". . . so called illegitimate children," said the California Supreme Court in the *Lund* case, "in truth could more accurately be referred to as the natural children of illegitimate parents. . . ."³¹

In *Estate of Garcia*, decided in 1949,³² the California Supreme Court unanimously laid at rest the notion which had received judicial sanction earlier³³ that legitimated illegitimates, with respect to inheritance rights are not on the same footing as those born legitimate. Said Justice Traynor:

²⁸ *In re Jessup's Estate*, 81 Cal. 408, 435, 22 Pac. 742, 750 (1889).

²⁹ *Laugenour v. Fogg*, 48 Cal. App.2d 848, 851-852, 120 P.2d 690, 692 (3rd Dist., 1942); see also *Estate of De Laveaga*, 124 Cal. 158, 75 Pac. 790 (1904).

³⁰ Edwin J. Lukas, *Babies are Neither Vendible nor Expendable*, 5 Record of the Ass'n of the Bar of the City of New York 88 at 98 (1950).

³¹ *Supra* note 19 at 642, 159 P.2d at 654.

³² 34 Cal.2d 419, 421, 210 P.2d 841, 842.

³³ *Wolf v. Gall*, 32 Cal. App. 286, 163 Pac. 346 (1916), on denying rehearing.

"It is clear, therefore, that with regard to direct inheritance from the father, the words 'illegitimate child' in section 255 [of the Probate Code] are applicable, not to every child who is born illegitimate, but only to children, born illegitimate, who have been legitimated under either section 215 or section 230 of the Civil Code. These words must have the same meaning with regard to inheritance through the father if their meaning has any consistency. Otherwise the restrictive language of section 255 would conflict with the provision of section 230 of the Civil Code that a child legitimated by adoption is thereafter 'deemed for all purposes legitimate,' and the provision of section 215 of the Civil Code that 'A child born before wedlock becomes legitimate by the subsequent marriage of its parents.' A child who is 'deemed for all purposes legitimate' cannot be regarded as still illegitimate for some purposes, and a child who has become legitimate can no longer be regarded as an 'illegitimate child.'

"The statutes are not in conflict when the words 'illegitimate child' are interpreted as referring only to children born illegitimate who have not been legitimated under the provisions of the Civil Code. Although this interpretation renders some of the restrictive language of section 255 superfluous, it is supported by the legislative history of the statutes."³⁴

* * * * *

Conclusion

Stepparent adoptions recognize and put the stamp of legal status upon a family relationship already in being, which usually came into existence when a second parent was added by marriage to an already existing family of the child or children and their biological or adoptive parent who had and retained full rights of custody and control, and the continuation of which does not depend upon the granting or denial of the petition of adoption. Adult adoptions create the legal status of parent and child but, except perhaps when they are also stepparent adoptions, they imply nothing with respect to normal family relationships and living plans. Whereas the stepchild usually has been and will continue to be living in the same household with the parent and stepparent, an adult adopted person may himself be married and have a family of his own and may not either before or after adoption have occupied or occupy a common household or other normal aspects of a family relationship with the adopting person. Conduct adoptions, being in truth legitimations without judicial action or other formal proceeding, couple biological paternity with the full legal status of parent and child. With respect to all three of these types of adoptions or so-called adoptions, therefore, there are major features which differentiate them from

³⁴ See also *In re Bartons Estate*, 94 Cal.App.2d 919, 212 P.2d 18 (1950).

what might be called ordinary adoptions. They are numerically significant and each possesses a set of legal and practical problems in its own right. They do not, however, either in numbers or in the character of the social problem presented, compare with ordinary adoptions. It is these which constitute the heart of California's adoption program.

III. *Ordinary Adoptions: Legal Character and Effect*

The Civil Code sections governing ordinary adoptions provide, in general: "Any unmarried minor child may be adopted by any adult person, in the cases and subject to the rules prescribed" in the chapter of the Civil Code on Children by Adoption.¹ But "The person adopting . . . must be at least ten years older than the person adopted,"² and a married man or a married woman cannot adopt without the consent of the spouse, unless there is a lawful separation or the spouse is not capable of giving consent.³

These provisions were first put in the Civil Code in 1872 and have undergone only minor changes in the intervening period. In 1874, the age difference was reduced from fifteen to ten years and a requirement was deleted that the person adopting must have been married, and, if a woman, must be a widow, or be lawfully divorced without her fault. In 1953, a distinction was made between unmarried and married minors, the latter being treated as adults.

A common way of describing the relation created by adoption is to speak of it as artificial and to contrast it with the "natural relationship." "The law," says Madden after employing the quoted terms, "cannot, and does not purport to, do the work of nature, and create one a child who by nature is a stranger. But it can and does fix the status of the adoptive child to the adoptive parent as substantially the same as the status of a natural child. By the act of adoption, the child becomes, in a legal sense, the child of the adoptive parent. The general effect of adoption, therefore, is, with few exceptions, to place the parties in the legal relation of parent and child, with all the legal consequences. The law declares the status, and from the status, as a necessary consequence, spring the ordinary rights, duties, and liabilities which arise out of the same status created by nature."⁴

Statements such as these raise more questions than they answer. Pulled together from various judicial opinions, they are better summaries of the rhetoric of the court than of the holdings; and emphasize rather than reconcile the divergent points of view out of which they are composed. The status of parent and child is "created," "fixed," or "declared," by the

¹ CALIF. CIV. CODE § 221.

² CALIF. CIV. CODE § 222.

³ CALIF. CIV. CODE § 223.

⁴ MADDEN, PERSONS AND DOMESTIC RELATIONS, 359-60 (1931).

law in cases of adoption, in other cases, "the same status," is "created by nature." The "artificial" adoptive relation gives rise to substantially the same rights, duties and liabilities "as arise out of the natural relation." There seems to be some confusion here between legal creation and biological procreation. Do rights, duties and liabilities "arise out of the natural relation?" Whatever may be said of the origins of the child, and, for that matter, of the parent, is the "status" of parent and child "created by nature?" Is not the "status" in both cases "fixed," "declared," and "created" by the law? And, indeed, does not the law fix, declare and create a different relationship among children all of whom occupy the same natural relation to their parents but some of whom were born within and some without wedlock? What is left of the parent child status "created by nature" when the law can and does fix, declare and create an adoptive parent-child relation, thereby at the same time extinguishing the relation of parent and child which existed before and was "created by nature?" Moreover, just what is the "natural relation" under discussion? It is scientifically clear that the "natural relation" is not what it is commonly said to be, namely, a "blood relation." If the genetic connection is what is meant, then it must be noted that the act of transmission is accomplished in a comparatively short time and does not necessarily involve any after-contact or relationship. Is this "natural relation" more natural or more important than the mutual, reciprocal and continuous relation between parent and child, which may occur in adoptive or non-adoptive families, involved in the rearing of a child from infancy to maturity with all of the impact of day-to-day care and upbringing upon character, psychology, outlook, emotional make-up, and even biology which that entails? In this sense, does not nature "do the work of nature" and create one a child who by nature is a stranger? In fact, in this sense, does not nature do the work of nature and create one a child who by nature is not a stranger?

In prescribing the effects of adoption with respect to the adoptive parents and child, the Civil Code speaks explicitly of the "legal" relationship. Civil Code Section 228 provides. "After the adoption the two [the adopting person and the child] shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation."⁵ In dealing with the effects of adoption upon the former

⁵ In at least one way provided by the Civil Code itself, the new "legal relation" differs from the old. It may be annulled in certain circumstances: "If any child heretofore or hereafter adopted under the foregoing provisions of this code shows evidence of being feeble-minded, epileptic or insane as a result of conditions prior to the adoption, and of which conditions the adopting parents or parent had no knowledge or notice prior to the entry of the decree of adoption, a petition setting forth such facts may be filed by the adopting parents or parent

parents, the word "legal" is absent from the clause discharging them of all rights and duties — hence, literally including natural rights and duties as well as legal — and the former parents are not referred to as "natural parents" but merely as "parents" — hence, presumably the provision applies to former adoptive as well as biological parents. Thus, Civil Code Section 229 provides: "The parents of an adopted child are, from the time of adoption, relieved of all parental duties towards, and all responsibility for the child so adopted, and have no right over it."

The over-all purpose of these sections, taken together with Civil Code Section 221, evidently was to create a new legal relationship of parent and child which normally would be coupled with the natural relation of parent and child springing from the fact that that is the relationship in which they actually live; and to make the new legal relationship legally the same as the old legal relationship of parent and child which normally is coupled both with the genetic and the factual natural relation of parent and child.

Despite this over-all purpose of the sections and the complete absence from them of any reference to "natural parents" (whether conceived as biological progenitors or as those who discharge the function of caring for and rearing the child with all its natural consequences), the distinction between the natural and adoptive relationship has always been prominent in the minds of many judges and is often the theme of discussion in judicial analyses of California Civil Code Sections 228 and 229.

In *Estate of Jobson*⁶ is illustrative, though it must be conceded that the facts in that case particularly invited such discussion if they did not render it inevitable. The question there at issue was whether the adopted child's relationship to his biological father was revived by the death of his adoptive parent. The adopted child, who had been reared in the adoptive family from the age of three years, had died intestate, leaving a widow but no issue. His adoptive parent had predeceased him three years earlier, transmitting to him by will the very estate the distribution of which was now in controversy. His biological father survived him and claimed one-fourth of the estate to which he was entitled under Civil Code Section 1386(2) if he was the "father." The California Supreme Court denied the claim and affirmed distribution of the entire estate to the widow as sole heir.

Two dissenting justices laid heavy emphasis on the distinction between

with the court which granted the petition for adoption. If such facts are proved to the satisfaction of the court, it may make an order setting aside the decree of adoption.

"The petition must be filed within which ever is the later of the following time limits: (a) Within five years after the entering of the decree of adoption, or (b) within one year after the effective date thereof, if such a condition were manifest in the child within five years after the entering of the decree of adoption." Calif. Civ. Code Sec. 227b. See Helling, *Adoption: Annulment of Status*, 29 Notre Dame Lawyer 68 (1953).

⁶ 164 Cal. 312, 317, 128 Pac. 938 (1912).

the "artificial" and the "natural" parent and child relation. Adoption statutes, they felt should be treated "like an invading force upon a hostile domain," and allowed to alter the natural relation "only so far as its lines extended."⁷ They argued. "The whole purpose and object of the adoption statute is to create, artificially, the relation of parent and child, to provide a status controlling them for thier joint lives. That relation cannot last longer than the lives of the two parties to it. When either dies, the relation ceases, and there remains nothing upon which the statute under which it was created can operate. It has not, as has the natural relation, blood connections through which it may continue to work after it has itself ceased to have a present existence. There is not in the adoption statute a word to the effect that, where the adoption has served its purpose by prevailing over the natural relation during the joint lives of the two parties and has ended by the death of one of them, it shall thereafter continue for any purpose. So far as the statute goes, and while the new statute, [status] lasts, the natural relations are altered, removed or suspended. But they are not utterly destroyed. The natural inclinations and affections must remain. The statute cannot destroy them. Beyond the limits of the changes affected by the adoption, and after it has terminated, the natural relations should prevail and control, since there are then, in that field, none other. The result should be and would be that, after this termination of the mutual relation, the inheritance from the survivor, upon his subsequent death, will be controlled by the general law of descent and the natural relationship will prevail." ⁸

Thus, in this remarkable passage: (1) the legal status of parent and child after adoption is not compared with the legal status of parent and child after biological parenthood but is instead compared with natural facts or supposed facts; (2) the natural relation is identified as consisting of "blood connections through which it may continue to work after it has

⁷ In *ex parte Clark*, 87 Cal. 638, 641, 25 Pac. 967, 968 (1891) the same doctrine was couched in terms of the adoption statutes as a derogation of the common law. "We have held that our law of adoption is not unconstitutional, but to acquire any right under it its provisions must be strictly followed, and all doubts in controversy between the natural and adopting parents should be resolved in favor of the former. A child by adoption cannot inherit from the adopting parents, unless the fact of adoption has been done in strict accordance with the statute. No matter how persuasive may be the equities of the child's case, or how clear the intention of all parties, it must appear that the statutory conditions have been strictly performed, otherwise the relation never existed, and the right to inherit never was acquired. The right of adoption is purely statutory. It was unknown to the common law, and as the right when acquired under our statute operates as a permanent transfer of the natural rights of the parent, it is repugnant to the principles of the common law, and one who claims that such a change has occurred must show that every requirement of the statute has been strictly complied with."

⁸ *Supra* note 6 at 319, 128 Pac. at 940-41.

itself ceased to have a present existence," and of "natural inclinations and affection;" (3) it is said the natural relationship cannot be destroyed, it can only be suspended by a statute; (4) there is no recognition of the fact that "natural inclinations and affections" may exist or be developed in the adoptive family and may never have existed or been developed as between the biological parents and the child, and that the statute cannot create or destroy them in the adoptive family any more than it can in the other family; (5) there is not the slightest hint that, whatever the elements might be in the natural relation, the status of parent and child in the relation is created by the law just as it is in the case of adoption.

The majority opinion in the *Jobson* case, far from disclaiming these views, itself spoke of treating "the act of adoption as creating a relation which produces as between the parties the legal results flowing from the natural relationship of parent and child."⁹ The majority felt itself bound however by the unequivocal demand of the sections that, after adoption, the adopting and adopted person "shall sustain towards each other the legal relation of parent and child" and the parents are "relieved of all parental duties . . . and have no right over" the child.

In general, despite the persistent emergence of these underlying conceptions, the California Supreme Court has taken the statutory language seriously. It has held that: the adoptive parent has the same right to paramount custody as the biological parent and, after adoption, guardianship of the adopted child is therefore improper.¹⁰ The residence of the adopting parent becomes the residence of the child;¹¹ adopted children are within the term "any lineal descendant" and are thus exempted from the burden of a collateral inheritance tax;¹² an adopted child is a "child" within the meaning of Section 1365 of the Code of Civil Procedure and thus entitled to letters of administration of the estate of the adopting parent;¹³ a court having control of a child's custody by virtue of the divorce of its parents is ousted of its jurisdiction by adoption;¹⁴ "an adoptive parent may contract with the natural parents to take care of, support and educate the adopted child for compensation as freely and legally as such contract could be made by the adoptive parent with a stranger to the blood of such child";¹⁵ an adopted child is not part of the immediate family of his biological father

⁹ *Id.* at 316, 128 Pac. at 939.

¹⁰ *In re Santos*, 185 Cal. 127, 195 Pac. 1055 (1921).

¹¹ *Estate of Taylor*, 131 Cal. 180, 63 Pac. 345 (1900).

¹² *Estate of Winchester*, 140 Cal. 468, 74 Pac. 10 (1903).

¹³ *Estate of Camp*, 131 Cal. 469, 63 Pac. 736 (1901).

¹⁴ *Younger v. Younger*, 106 Cal. 377, 39 Pac. 799 (1895).

¹⁵ *Mitchell v. Brown*, 18 Cal. App. 117, 121, 122 Pac. 426, 427 (1912).

for the purpose of having set aside as exempt property insurance proceeds paid into the estate of such father.¹⁶

The California Supreme Court has adhered to the same line with respect to inheritance rights as between parent and child. In *In re Newman*¹⁷ the right of the adopted child to inherit from the adoptive parents was held to follow inevitably from the adoption statutes. "The provisions of sections 227 and 228," said the court, "extend to all the rights and duties of natural parents and children. The language is general and comprehensive. The use of the word 'issue,' in section 1386, does not limit the right of inheritance to the natural children only. The word 'issue' is there used in the same sense as the words 'child' and 'children.'"¹⁸

With respect to other relatives, however, the "natural relationship" conception has prevailed. In *In re Darling*¹⁹ the court laid down the rule regarding genetic grandparents. The child's "relationship to his grandparents by blood on either side is not affected by the adoption. As to them, he is, notwithstanding the adoption the 'issue' or 'child' of their child."²⁰ California Supreme Court dicta²¹ and lower court holdings²² have similarly declared that the inheritance rights of an adopted child do not extend to the ancestors or collateral relatives of the adopting parent because "the rules of computation of the degrees of kindred . . . evidently contemplated relationship by consanguinity."²³

Professor Armstrong summarizes the California law concerning the adopted child's inheritance rights as follows: "The general pattern developed by the California adoption decisions and dicta is clear. It leaves the adopted child and his descendants, for succession purposes, in the family tree into which he was born with all his 'sisters and his cousins and his aunts' and other blood relatives, lineals and collaterals, save only his father and mother. In exchange for the latter (i.e., his father and mother by blood) he and his descendants receive his adopting parent (or parents) but he and his descendants do not receive any place in the existing ancestral family tree of his adopting parent (or parents). Our law apparently creates no new legal lineal or collateral ancestral 'relatives by adoption.'"

"As to actual decisions, however, it may be noted that the question

¹⁶ Estate of Pillsbury, 175 Cal. 454, 166 Pac. 11 (1917).

¹⁷ 75 Cal. 213, 219, 16 Pac. 887 (1888).

¹⁸ *Id.* at 219, 16 Pac. at 888; see also Estate of Mercer, 205 Cal. 506, 271 Pac. 1067 (1928).

¹⁹ 173 Cal. 221, 159 Pac. 606 (1916).

²⁰ *Id.* at 228, 159 Pac. at 609.

²¹ *Ibid.*

²² Estate of Pence, 117 Cal. App. 323, 4 P.2d 202 (2d Dist., Div. 1, 1931), Estate of Jones, 3 Cal. App.2d 395, 39 P.2d 847 (2d Dist., Div. 1, 1934), Estate of Stewart, 30 Cal. App.2d 594, 86 P.2d 1071 (1939). See ARMSTRONG, FAMILY LAW 134 ff. (1953).

²³ Estate of Pence, *Id.* at 333, 4 P.2d at 206.

whether children born to his blood parents after his adoption (or such children's descendants) would be legally related to the adopted child has not been adjudicated. Similarly no case has reviewed the converse questions, i.e., whether children born to his adopting parent *after* they adopt him (or such children's descendants), legally as well as factually, would be his brothers and sisters."²⁴

Professor Armstrong concludes that, since "succession rights are based upon rules which make sense only on the assumption of contact with" the blood relatives, "a legislative re-examination of our adoption statutes leading to a revision of the succession aspects of adoption would seem in order."²⁵ Certainly it is with respect to succession rights that the two natural relationship theories—the genetic theory and the theory that "natural inclinations and affections" derive from family experience and contact—come into sharpest conflict. On the family experience and contact theory, the relatives of the adoptive parents, lineal and collateral, become the relatives of the adopted child. Normally, they are the only grandparents, uncles, aunts, brothers, sisters and cousins he knows. His genetic grandparents, uncles, aunts, brothers, sisters and other relatives in a sizable percentage of cases of illegitimate birth will not even have been aware of his existence; and in many other instances will have known him only very briefly prior to his surrender for adoption as a very young infant. Moreover, even if property is to follow the genes, collaterals would have to be excluded since they do not inherit the genes being followed but only possess genes that were drawn from a common stock. Thus, brothers and sisters especially, (but all other collateral relatives as well) both on the common family experience and contact theory and on the genetic theory, must be those of the adoptive family whether born before or after the adoption or even if acquired by adoption. In these circumstances there would be little point to drawing a distinction between children born before and those born after adoption — as Professor Armstrong proposes the judges should do pending legislative revision — neither allowing the adopted child "any legal relationship to after-born children of the blood parents whose relationship to him has been extinguished, nor denying him legal relationship to after-

²⁴ ARMSTRONG, *op. cit. supra* note 22 at 1242.

²⁵ *Id.* at 1243. S.B. 112 introduced in the present session of the State Legislature provides: "Section 257 of the Probate Code is amended to read: An adopted child succeeds to the estate of one who has adopted him and to the estates of the lineal and collateral kindred of such adoptive parent, the same as a natural child; and the person adopting and such person's lineal and collateral kindred succeed to the estate of an adopted child, the same as a natural parent and natural kindred. An adopted child does not succeed to the estate of a natural parent or to the estate of lineal and collateral kindred of such parent when the relationship between such child and parent has been severed by the adoption, nor does such natural parent or kindred succeed to the estate of such adopted child."

born children of the parents who have replaced his blood parents." This distinction can only be justified as a somehow advisable judicial concession to the disapproved principle of succession (actual past decisions of the California Supreme Court do not make it necessary) for in part it allows the extinction of the old legal relationship and the institution of the new to govern inheritance instead of the facts of family life.

These, then, are the code sections and judicial interpretations which bear upon the character and effects of adoption. Whether in their present form, or modified as proposed above, they are only the legal aspects of what is in fact a considerable social problem. They constitute the encasing outer shell to some extent limiting, to some extent protecting, and to some extent determining the shape of the interests and activities comprising the vital substance that lies within. Succession rights, rights to letters of administration, rights to family allowances and insurance proceeds, rights to preferred inheritance tax treatment, and the like, are undeniably important both socially and to the individuals concerned. They are, however, a residual or contingent remainder of an earlier existing and far more important family relationship, now dissolved by death or otherwise broken up; and they are, in any event, altogether peripheral to the human, personal and social values in the family relationship and experience which are at the center of adoption. The legal right to the custody, services and earnings of the child and the legal duty to supply him with care, support, upbringing and education come nearer to that center but are still a considerable distance from it. Adoption, in short, is much more than a new legal relationship.

IV. *The Social Problem*

What is the social problem with which the law of adoption is intended to cope? What are the elements which compose it? Who are the children adopted and available for adoption? Who are their biological parents? Who are the adoptive parents? Why do the biological parents surrender and the adoptive parents adopt children? What is the magnitude of the problem?

Some of these questions cannot be answered completely. The answers lie buried in uncollected and unanalyzed data or hidden deeply in the mysteries of nature and psychology not yet probed by science. In other aspects, however, the critical data are at hand.

The United States Children's Bureau estimated that the number of adoption petitions filed in the United States in 1951 totalled 80,000. Between 1944 and 1951, there was a 60 per cent increase in such petitions. The reasons given by the Children's Bureau for the increase were the large number of homes broken by death, divorce and desertion during and since the war, the increase in the number of illegitimate children born in that period and the growing belief of social agencies that periods of institutional

care should be held at a minimum and children should be placed for adoption as rapidly as is consistent with adequate opportunity for the biological parents to make a sound decision and for agency study of the child and the prospective adoptive home.¹ To this list of factors might plausibly be added improved social attitudes towards adoption and adopted children, a high level of economic well-being, and increased popularity of having children.

In California, in 1953-1954, there were 8,433 adoption petitions filed.² The increases in the number of adoptions in California during the last fifteen years are shown in the following data:

1941-1942	2,412	1951-1952	6,923
1943-1944	3,972	1953-1954	8,433

The increases in California have been even greater than those in the nation as a whole: 77 per cent increase from 1943-1944 to 1950-1951; 250 per cent from 1941-1942 to 1953-1954.

In addition to the factors mentioned by the Children's Bureau, California's increase is to be explained in terms of the tremendous influx of population from other states and the fact that coastal urban areas were concentration points of parental separation during and after the war.

Adoptable children are part of a larger group of destitute, homeless and neglected children. Some inkling of the size and character of the larger group can be gathered from a study made by the United States Children's Bureau in 1945. Relying on 1940 census data the Bureau concluded that 10.7 per cent of the minors in six states under review³ lived apart from their parents and 31.4 per cent of these lived in non-relative homes or institutions. The figures for California were 10.3 per cent not living with parents and 38.9 per cent of these living with non-relatives.⁴

Many of the children living outside parental homes, it may be conjectured, have one or even two parents interested in them and with a sense of responsibility for them. For some part of these, consequently, the separation is only temporary. The Children's Bureau believed that "very probably, for many more, the parents' death, incompetence, indifference, or legal separation or divorce, or the child's own mental, physical, or emotional inadequacy, necessitates a separate living arrangement."⁵ In all likelihood,

¹ FEDERAL SECURITY AGENCY, CHILDREN'S BUREAU, ADOPTION OF CHILDREN, STATISTICAL SERIES No. 14 (1951).

² Since some adoption petitions are denied by the courts and others are withdrawn by the prospective adopting parents, the number of adoption petitions filed in a year is normally considerably larger than the number of adoptions actually consummated.

³ California, Connecticut, Florida, Louisiana, Michigan, Missouri.

⁴ FEDERAL SECURITY AGENCY, GUARDIANSHIP: A WAY OF FULFILLING PUBLIC RESPONSIBILITY FOR CHILDREN, CHILDREN'S BUREAU PUBLICATION No. 330, 137-38 (1949).

⁵ *Id.* at 38.

it is in these terms that a fair part of the high percentage of children living in non-relative homes and institutions must be explained.

A Los Angeles study of 1952 tends to confirm this belief and to shed light on the situation of children living with non-relatives. The Citizens' Committee on Adoption in that city investigated 3,394 children under the age of seventeen in foster homes and institutions under the auspices of public or private agencies. Children placed in foster homes directly by their parents were excluded from the study. The committee found that of the 3,394 children, only 14 per cent had parents living together; 25 per cent of the fathers were listed as "whereabouts unknown," 11 per cent of the mothers were so classified, 3 per cent of the children were full orphans, 12 to 18 per cent were in need of adoption planning but only 2.5 per cent were legally free for adoption.⁶

Children of all ages are placed for adoption and have adoption petitions filed for them. According to a 1951 study of the United States Children's Bureau covering 25 states: 35 per cent of the children *placed for adoption* were under one month old, 11 per cent were between one and three months; 11 per cent were between three months and six months; 12 per cent were between six months and one year; 23 per cent were between one year and six years, 7 per cent were between six years and twelve years and one per cent were over 12 years.⁷ Fifteen per cent of the children *for whom adoption petitions were filed* were under six months old, 25 per cent were between six months and two years, 29 per cent were between two years and six years; 24 per cent were between six and fourteen years and 7 per cent were 14 years and over.⁸ The decided emphasis, however, is upon

⁶ *Final Report, Citizens Committee, Adoption of Children in California*, 12 (1953). The Committee concluded: "The existence of large numbers of children away from their own homes is in part due to the lack of basic community services to assist children and their parents while families are still intact, as well as services to assist parents in the rehabilitation of their homes so that a child in foster care may be returned to his home after only a temporary separation. It is also partly due to inadequate adoption services in the past."

Sixty-nine per cent of the 3394 children were under the jurisdiction either of the county bureau of public assistance or the probation department; sixty-four per cent had board paid by public agencies.

Conclusions similar to those of the Citizens Committee were reached by the State Department of Social Welfare in a recent study of 74 per cent of the children in the Department's Aid to Needy Children Foster Care Program. "the findings showed that for many children adequate services were not being provided to help keep families together; that children were placed in boarding homes and institutions without sufficient planning and preparation, and children were allowed to remain in foster care because of lack of help to parents in re-establishing their homes. Many cases showed frequent changes in placement resulting in a lack of continuity of care and of the stable home environment needed for normal growth and development. Report on Department Accomplishments in the Aid to Needy Children Foster Care Program (prepared for California Senate Finance committee in hearings on the 1954-55 budget) SDSW 1 (Jan. 5, 1955).

⁷ CHILDREN'S BUREAU STATISTICAL SERIES No. 14, *supra* note 1 at 16.

⁸ *Id.* at 15.

young children. Sixty-nine per cent of those placed for adoption are under the age of one year; the median age of children at the time of filing adoption petitions is 3.3 years; two-fifths are under two years.

The experience of adoption agencies is that boys over the age of two and girls of an older age are "hard to place," or, as the preferred expression now is, are "children with special needs." There is no automatic and hardly any appreciable demand for them by prospective adoptive parents who are not relatives. Other children with special needs, in whom adoptive interest must be cultivated, are children with physical handicaps, children with some mental retardation, children with emotional problems and children of minority race and nationality.⁹ In June of 1950 for example the Los Angeles County public adoption agency had: 44 Negro children under care, with applications from only 30 Negro families; 53 children of Mexican descent with applications from only 22 Mexican families; 11 children of Oriental and mixed racial elements with only applications from six families of the same race.¹⁰

In California 86.9 per cent of agency or relinquishment adoptions were White, and 13.1 per cent non-White (Negro, Mexican, etc.), in independent adoptions 90.6 per cent were White, 9.4 per cent were non-White.¹¹

Fifty-one per cent of the children covered in the twenty-five state study of the Federal Bureau were born out of wedlock, with mothers two out of

⁹ Helen W. Hallinan, *Who Are the Children Available for Adoption?* ADOPTION PRINCIPLES AND SERVICES, Family Service Association of America, 21, 22, 26 (1952). *Final Report, Citizens Committee*, *supra* note 6 at 10 (1953), *Annual Report, SDSW, Problems in the Adoption Program* (1954), Marilyn Nott, *Breaking Adoption Bottleneck*, 86 SURVEY 443 (1950).

¹⁰ Marilyn Nott, *Id.* at 445. The 1951 Children's Bureau Study revealed that of the children for whom adoption petitions were filed 94 per cent were white, 4 per cent were Negro and 2 per cent were other. The Children's Bureau explains these figures as follows: "Only 6 per cent of the children for whom adoption petitions were filed in the 26 States under discussion were nonwhite whereas the nonwhite child population in these States was 14 per cent. For the 5 reporting States with the highest proportion of nonwhite children (Arkansas, Florida, Georgia, Louisiana, Virginia), the difference was even greater — 10 per cent of the children adopted, but 29 per cent of the total child population was nonwhite.

"Among the factors accounting for the relatively small number of adoptions among non-whites is the inadequacy of adoptive services for Negro children and the inability of agencies to find adoptive homes for them. In many agencies, moreover, the pressure of applicants for the adoption of white children forces concentration on services for white children at the expense of services to Negro children.

"Another reason for the small number of Negro adoptions may be that many adoptable Negro children are 'taken in' by relatives or friends. These children often live with families just as they would if they were adopted, although the legal process has not been consummated. There may be economic reasons why the adoption does not take place or this may be due to lack of understanding as to what the legal process means to the child and the family." *Supra* note 7 at 3.

¹¹ These dates are for the calendar year 1953.

every five of whom were teenagers.¹² Of the remaining 49 per cent the majority come from homes broken by divorce, separation or desertion, (27.4 per cent) In 8.9 per cent of the cases one or both parents were dead. In 4.2 per cent of the cases the parents were alive and living together.¹³

The data in California are these: For relinquishment or agency adoptions, born in wedlock 8.6 per cent, born in wedlock — husband not father 14.1 per cent, born out of wedlock 76 per cent, other 1.2 per cent;¹⁴ for independent adoptions, born in wedlock 28.9 per cent, born in wedlock—husband not father 19.5 per cent, out of wedlock 44.1 per cent.¹⁵

The age of parents at time of birth of child, California statistics show is. for the relinquishment or agency program, less than 20 years, 29.2 per cent; less than 25 years, 67.9 per cent; less than 30 years, 86.2 per cent; less than 40 years, 99.0 per cent; for independent placements, less than

¹² One out of four of whom are below the age of sixteen. Ralph Goff, *Introduction Proceedings, INSTITUTE ON UNWED PARENTHOOD*, IV (Nov. 1952).

¹³ CHILDREN'S BUREAU, STATISTICAL SERIES No. 14, *supra* note 1 at 17

¹⁴ Tabulated as to race these data are as follows:

RELINQUISHMENT ADOPTIONS: Race of Child by Legal Status, 1953						
Legal Status of Child	Total		White		Other	
	Number	Percent	Number	Percent	Number	Percent
Total	1,126	100.0	979	100.0	147	100.0
Born in wedlock						
Husband Father	97	8.6	93	9.5	4	2.7
Husband not Father	159	14.1	141	14.4	18	12.3
Born out of wedlock	856	76.0	735	75.1	121	82.3
Other (1)	13	1.2	9	0.9	4	2.7
Not reported	1	0.1	1	0.1	.....	.....

(1) Includes legitimated by 230 c.c., legitimated by marriage and foundling.

State Department of Social Welfare, Bureau of Research and Statistics, Feb. 1955.

¹⁵ INDEPENDENT ADOPTIONS: Legal Status of Child by Person or Agency Making Placement, 1953

Placement made by	LEGAL STATUS OF CHILD				
	Born in Wedlock				
	Total	Husband Father	Husband Not Father	Born Out of Wedlock	Other
Total	3,981	1,150	778	1,753	300
Percent	100.0	28.9	19.5	44.1	7.5
Parent	1,512	603	272	552	85
Relative of parent	147	57	25	51	14
Physician	1,176	190	271	662	53
Attorney	219	47	48	114	10
Friend of parent	301	72	64	144	21
Probation officer	102	53	15	25	9
Out of state agency	66	26	7	30	3
Other welfare agency	130	33	22	56	19
Other	239	43	53	111	32
Not reported	89	26	1	8	54

20 years, 22.5 per cent; less than 25 years, 57.9 per cent; less than 30 years, 77.3 per cent, less than 40 years 92.1 per cent.¹⁶

In both agency and independent adoptions, roughly two-thirds of the mothers had resided in California for one year or longer; 29 per cent in agency cases and 18 per cent in independent cases resided here for less than a year; and one per cent in agency cases and 11 per cent in independent cases were residents of other states or countries. In 97.7 per cent of agency cases and 86.7 per cent of independent cases the child was born in California.¹⁷

¹⁶ RELINQUISHMENT ADOPTIONS: Age of Parents at Birth of Child, 1953 and 1952

Age of Parents	1953				1952			
	MOTHER		FATHER		MOTHER		FATHER	
	Number	Pct.	Number	Pct.	Number	Pct.	Number	Pct.
Total	1,126	100.0	1,126	100.0	696	100.0	696	100.0
Less than 20 years	329	29.2	139	12.4	232	33.4	78	11.2
20-24 years	435	38.7	346	30.7	257	36.9	246	35.3
25-29 years	206	18.3	285	25.3	132	19.0	162	23.3
30-39 years	144	12.8	210	18.7	65	9.3	121	17.4
40 years and over	5	0.4	70	6.2	5	0.7	34	4.9
Not reported	7	0.6	76	6.7	5	0.7	55	7.9

State Department of Social Welfare, Bureau of Research and Statistics, Feb. 1955.

INDEPENDENT ADOPTIONS: Age of Parents at Birth of Child, 1953 and 1952

Age of Parents	1953				1952			
	MOTHER		FATHER		MOTHER		FATHER	
	Number	Pct.	Number	Pct.	Number	Pct.	Number	Pct.
Less than 20 years	894	22.5	248	6.2	826	24.1	215	6.3
20-24 years	1,411	35.4	1,007	25.3	1,191	34.7	923	26.9
25-29 years	774	19.4	952	23.9	651	19.0	771	22.5
30-39 years	588	14.8	832	20.9	508	14.8	753	21.9
40 years and over	80	2.0	333	8.4	62	1.8	272	7.9
Not reported	234	5.9	609	15.3	193	5.6	497	14.5

State Department of Social Welfare, Bureau of Research and Statistics, Feb. 1955.

¹⁷ RELINQUISHMENT ADOPTIONS: Birthplace of Child, 1953 and 1952

Birthplace	1953		1952	
	Number	Percent	Number	Percent
Total	1,126	100.0	696	100.0
In California	1,100	97.7	680	97.7
Mother resident				
Less than 1 year	(332)	(29.5)	(1)	(1)
Mother resident				
1 year or longer	(768)	(68.2)	(1)	(1)
In another state	16	1.4	10	1.4
Not reported	10	0.9	6	0.9

(1) Not available.

INDEPENDENT ADOPTIONS: Birthplace of Child, 1953

Birthplace	Number	Percent
Total	2,864(1)	100.0
In California	2,482	86.7
Mother resident, less than 1 year	(526)	(18.4)
Mother resident, 1 year or longer	(1,956)	(68.3)
In another state	243	8.4
In a foreign country	71	2.5
Not reported	68	2.4

(1) Includes only cases on which approval was recommended.

State Department of Social Welfare, Bureau of Research and Statistics, Feb. 1955.

In slightly over half of all cases, those who petition for the adoption of children are the relatives of the children. One per cent are biological parents of the children, 39 per cent are stepparents, 12 per cent are other relatives.¹⁸ The percentage of relatives and non-relatives filing petitions varies with the birth status of the child. non-relatives are the petitioners for 69 per cent of the adoptive children born out of wedlock, relatives are the petitioners for 75 per cent of the adoptive children born in wedlock.¹⁹

Reflecting the fact that nearly 80 per cent of relative adoptions are by stepparents and the further fact that children normally do not acquire stepparents while they are very young, children adopted by relatives are on the average older than children adopted by nonrelatives. Two-thirds of the children adopted by nonrelatives were under two years of age at the time the petition was filed, only one-tenth of those petitioned for by relatives were below that age.²⁰

Adoption is not just the indulgence of the rich. Adoptive parents, on the contrary, are couples with widely varying resources and incomes. In California of couples petitioning for agency adoptions almost half had annual incomes of less than \$5,000, and about one-fifth less than \$4,000.²¹

¹⁸ CHILDREN'S BUREAU, STATISTICAL REPORT No. 14, *supra* note 1. Table 3 at 13.

¹⁹ CHILDREN'S BUREAU, STATISTICAL REPORT No. 14, *supra* note 1, 7-8.

Adopted children born in wedlock	Petitions filed by:	
	Relatives	Nonrelatives
Total—number reported	7,772	2,635
Total—per cent	100	100
Both parents dead	2	3
One parent dead	19	15
Both parents living and together	4	25
Both parents living, marriage broken	70	46
Other and not reported	5	11

²⁰

Age at time of petition	Petitions filed by:	
	Relatives	Nonrelatives
Under 6 months	3%	25%
6 months, under 2 years	8	41
2 years, under 6 years	38	22
6 years, under 14 years	40	10
14 years, under 21 years	11	2

CHILDREN'S BUREAU, STATISTICAL SERIES No. 14, *supra* note 1, 6.

²¹ RELINQUISHMENT ADOPTIONS: Annual Income of Adopting Parents, 1953
Annual Income of
Adopting Parents

	Number	Percent
Total	1,126	100.0
Less than \$4,000	222	19.7
\$4,000-4,999	324	28.7
5,000-5,999	208	18.5
6,000-7,999	217	19.3
8,000-9,999	72	6.4
10,000 and over	83	7.4

Petitioners for independent adoptions had higher incomes. Only 37 per cent had incomes under \$5,000, 43.9 per cent were in the \$5,000 to \$10,000 income range and 13.9 per cent had over \$10,000.²² In interpreting these data it must be noted that stepparents are not included, that persons with available cash can more easily secure children in the black and grey market and that, even though state and county agencies and judges place more weight on ability of a couple to manage on its income than on the size of the income, still couples who fall below a minimum are denied adoptions.

Adoptive parents fall within the following age ranges:

INDEPENDENT ADOPTIONS: Age of Woman Petitioner by Age of Man
Petitioner at Time Petition was Filed
1953

Age of Woman Petitioner	Total		AGE OF MAN PETITIONER						
	Number	Percent	Less than 20 years	20-29 years	30-39 years	40-49 years	50 years and over	No Man Petitioner	Not Reported
Total	3,981	100.0	....	430	2,089	1,049	224	44	145
Per Cent	100.0			10.8	52.5	26.4	5.6	1.1	3.6
Less than 20 years....	6	0.2	....	4	1	....	....	1	....
20-29 years	834	21.0	....	347	448	36	1	2	....
30-39 years	2,127	53.4	....	72	1,484	524	38	5	4
40-49 years	754	18.9	....	5	148	470	108	22	1
50 and over	97	2.4	....	....	4	10	73	10	....
No woman petitioner	17	0.4	....	2	4	4	4	....	3
Not reported	146	3.7	....	....	....	5	....	4	137

RELINQUISHMENT ADOPTIONS: Age of Adopting Mother by Age of Adopting
Father at Time Petition was Filed
1953

Age of Adopting Mother	Total		Age of Adopting Father			
	Number	Percent	20-29 Years	30-39 Years	40-49 Years	50 and Over
Total	1,126	100.0	134	736	246	10
Per Cent	100.0		11.9	65.4	21.8	0.9
20-29 years	243	21.6	99	137	7	....
30-39 years	795	70.6	34	566	190	5
40-49 years	86	7.6	1	33	48	4
50 and over	1	0.1	....	....	....	1
Not reported	1	0.1	....	....	1	....

State Department of Social Welfare, Bureau of Research and Statistics, Feb. 1955.

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INDEPENDENT ADOPTIONS: Annual Income of Petitioners, 1953
Annual Income of
Petitioners

	Number	Percent
Total	3,981	100.0
Less than \$4,000.	562	14.1
\$4,000-4,999	911	22.9
5,000-5,999	726	18.2
6,000-7,999	765	19.2
8,000-9,999	258	6.5
10,000 and over	551	13.9
Not reported	208	5.2

State Department of Social Welfare, Bureau of Research and Statistics, Feb. 1955.

Thus, though adoptive parents are generally older than the biological parents who surrender the children for adoption, they are still within the ages of biological competence to have children. As to those who are non-relatives, they are usually, however, couples who have attempted biological parenthood and failed to achieve it. Sometimes adoptive couples have had stillbirths, miscarriages or abnormal children. Occasionally, a prospective adoptive mother expresses excessive fear of bearing a child or the husband an unwillingness to expose his wife to its hazards. It is a basic fact, however, that couples seldom deliberately choose parenthood by adoption in preference to biological parenthood.²⁴ The California Citizens Committee on Adoption reported that physicians believe that as many as one out of every eight couples are involuntarily childless.²⁵

The motives for adoptive parenthood are apparently as numerous and complex as the motives for biological parenthood. Some couples are very uncomplicated about it: they just want to have children. Others, beset by emotional difficulties, look on parenthood "as a tool for healing personality problems adults themselves have failed to conquer." Others view it as a possible solution to marital discord or wandering affections. Some hope it will be solace and replacement for a lost child of their own. Others feel a need for it to place them on an equal footing in their social set. Still others fall prey to stories that biological parenthood, though before impossible, often occurs after adoption.²⁶ "The desire for adoption," concludes one writer after reviewing these possible motives, does not necessarily prove "the desire for children."²⁷

Each of the groups of biological parents — unwed mothers, once married but now no longer married mothers, parents married and living together — and the adoptive parents is beset by a complex of problems.

"The term unwed parenthood," says Dr. Bernard, "is a hybrid designation. The unwed part is sociological and refers to a status that is a violation of our social institutions. Since unwed parents are a large collection of individuals whose psychiatric diagnosis is quite removed from the terminology, which is only descriptive of biological and sociological status, we cannot talk about a single category of people. We find persons in all the various categories, and having in common only the fact of unwed parenthood."²⁸

²⁴ Ruth Michaels *Special Problems in Casework with Adoptive Parents*, ADOPTION PRINCIPLES AND SERVICES, Family Service Association of America 37 (1952)

²⁵ FINAL REPORT, *supra* note 6 at 18.

²⁶ *Id.* at 18-19; and Michaels, *supra* note 24 at 38-39.

²⁷ *Ibid.*

²⁸ DR. VIOLA W. BERNARD, *Problems Related to Unmarried Parenthood*, PROCEEDINGS, INSTITUTE OF UNWED PARENTHOOD 15 (1952).

With this caution well in mind it still may be possible to say some things which are often or generally true of the situation of the unwed mother. Her problem is likely to be partly financial, partly social, partly psychological, and partly inexperience.²⁹ She needs money for hospital and doctor's bills, and for her own support and eventual return to her home community. Her earning capacity is severely limited first by her pregnancy, then, after delivery, by the need to care for the child, and, at all times, in many cases, by her youth and inexperience. Often her parents and other relatives are

²⁹ See generally the PROCEEDINGS, INSTITUTE ON UNWED PARENTHOOD (mimeo, SDSW (1952), LEONTINE YOUNG, OUT OF WEDLOCK (1954), SARA B. EDLIN, THE UNMARRIED MOTHER IN OUR SOCIETY (1954), UNDERSTANDING THE PSYCHOLOGY OF THE UNMARRIED MOTHER, Family Serv. Ass'n of America (1947). With particular reference to the social and psychological aspects of unwed motherhood see, HELENE DEUTSCH, M.D., II PSYCHOLOGY OF WOMEN, Chap. 10, *Unmarried Mothers*; Babbette Block, *The Unmarried Mother*, PUBLIC HEALTH NURSING 154 (July, 1951). With particular reference to minority groups see, Annie-Lee Davis, *Attitudes Toward Minority Groups: Their Effect on Social Services for Unmarried Mothers*, THE CHILD (Dec. 1948).

Charles E. Vincent, Instructor in Family Sociology at the University of California, has suggested the possibility of sampling bias in studies of unwed motherhood. He writes in *The Unwed Mother and Sampling Bias*, 19 AMERICAN SOCIOLOGICAL REVIEW 562 (1954), "A preliminary survey of the investigations of unwed motherhood indicated that the majority of the samples studied have been taken from public institutions, welfare agencies and psychiatric clinics. This method of sampling has prolonged the picture of the unwed mother as being an extremely young, poor, uneducated or psychologically disturbed female. This sampling procedure is in part related to the ease with which such groups can be studied. It is also related to, and in turn reinforces, a like-causes-like approach which tends to regard unwed motherhood as bad and then emphasizes bad or pathological etiological factors. Historically, the factors emphasized have ranged from mental deficiency in the 1920's to psychological disturbances at the present time.

The findings reported in the present paper resulted from a deliberate attempt to sample unwed mothers who do not go to agencies, clinics or institutions. The data were based on a 71 per cent response from 576 doctors who provided information on 137 unwed mothers delivered in private practice in Alameda County, California, during 1952.

The following findings suggest the need for more inclusive samples in studies of unwed motherhood and raise additional questions for future research. Of the 137 unwed mothers delivered in private practice: 83.9 per cent were white; 51.8 per cent were 22 years of age or older; 38.0 per cent had attended or completed college and 34.3, 24.8, and 35.8 per cent, respectively, of their fathers, mothers and alleged sexual mates had attended or completed college; 60.5 per cent were employed in professional or white collar jobs or were college students, and only 8.8 per cent were employed in semi-skilled or unskilled jobs; 36.5 per cent of 74 who were working, received a salary of \$251 dollars or more per month, 78.4 per cent of those who came from out of the state to have their baby in California had attended or completed college; 50.0 per cent of those who had attended or completed college were mated sexually with a man seven or more years their senior; 70.0 per cent of those with less than a 12th grade education were mated sexually with a man the same age or not more than two years their senior; 90.0 per cent of those who had attended or completed college were mated with an alleged sexual mate who had attended or completed college.

Occupational association appeared to be operative as a situational factor in some of the 89 cases for which occupational data were available for both the unwed mother and the alleged sexual mate. *Id.* at 566-67.

unable or unwilling to help if she can bring herself to let them know her situation. In upward of one-third of the cases in California, she is ineligible for many forms of public and private aid because she is not a resident of the state; and in many other cases, though a resident of the state, she has left her residence in small towns and in the country for delivery in an urban area.³⁰ Additional obstacles to the availability of financial assistance under the federal-state Aid to Needy Children program are the necessity to contact parents and the legal requirement that all cases of non-support be referred to the district attorney for action.³¹ Generally inexperienced in the handling of her own ordinary affairs, let alone affairs of this sort, (40 per cent are teenagers, 25 per cent are below the age of sixteen) largely ignorant of available alternatives, she welcomes any out compatible with what she feels to be a need for speed and secrecy. Concerned about the future of the child and her own future in the face of social stigma, confronted with the awesome experience of childbirth or deep-moving post-natal reactions, devastated by a sense of isolation and depression, she may very well need at least what one lawyer familiar with the field calls "supportive therapy in a uniquely personal sense."³² In this period of trauma, without adequate assurance and help, her decision to surrender her baby is likely to be uncertain, impulsive, fear-ridden and remorseful rather than a considered judgment made in full knowledge of all the circumstances. Decisions so made are a fertile source of later regret, repudiation, refusal to execute legal consent and efforts to regain custody.

What about the father of the unmarried mother's child? He is the forgotten man. There is almost no literature or research probing his psychology or his inner life. He has not been dissected statistically in graphs and charts showing his age, his geographical, racial and religious distribution, his economic and marital status. It is a common saying among social workers that, while society metes out punishment to the unwed mother, it is anxious to have the product of illicit relations to satisfy the demand of sterile couples for adoptable children. Society is therefore principally concerned about the adoptive parents, secondarily about the child which meets their need, and thirdly about the mother of the child and then only because she is an indispensable incident to getting it. The most conspicuous thing about

³⁰ Leontine Young, *The Unmarried Mother: Problems of Financial Support*, 35 SOCIAL CASEWORK 99 (1954). For a discussion of the financial problems of unwed mothers in California and of other problems of unwed mothers and the lack of services to meet them in California, see Charles I. Schottland, *A Report on Services for Unmarried Mothers in California*, PROCEEDINGS, INSTITUTE ON UNWED PARENTHOOD 8 (1952).

³¹ Schottland, *ibid* at 12, Sister Rosemary Markham, *The View of the Social Worker*, PROCEEDINGS, INSTITUTE OF UNWED PARENTHOOD 38 (1954).

³² Edwin J. Lukas, *Babies Are Not Vendible or Expendable*, 5 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 88, 105 (1950).

the father is his absence from society's contemplation and from discussions about the problem of unwed parenthood. He is little more than a biological datum known inevitably to have been present at an earlier stage but now primarily only of geneological significance. The obscure position of the father is probably due mainly to four factors: It is due to the fact that he may with a fair amount of success deny paternity or by simply disappearing to escape legal liability and social consequences. The mother's biological function is attended by more conclusive and generally visible evidence of the facts. It is due also to the fact that in our culture social and sexual mores are different for men than for women. Thirdly, the unwed mother is often unwilling or unable to identify the father or, in any event, wishes to have nothing more to do with him. Finally, "the punitive nature of our laws, court decisions, and official rulings places even the most conscientious man immediately on the defensive," an attitude which is "scarcely conducive to encouraging his interest in the direction of action."³³ But whatever the reason, the unwed father (some of them may be married but to other women) plays little part in solving the problems of the unwed mother or of the child, at least in those cases in which the child finds its way into adoption channels.³⁴

The group of mothers who have been married but who are at time of delivery, divorced, separated, deserted or whose marriages have been annulled, have legal, financial and psychological problems which may or may not be different from those of unwed mothers but which are in any event acutely felt. In many cases, they have only recently gone through the failure and breakup of their marriages with likely attendant emotional turmoil. Some with and some without social stigma, they all face the necessity of reorganizing their lives and redetermining their futures. Conflicting desires and impulses about keeping or surrendering the child are not less common and intense with them, because they are perhaps older and have had marital experience, than they are with unwed mothers. Moreover, they are as likely to be in straightened financial circumstances. Their source of support is permanently gone, if it was their husband, and at least temporarily interrupted if they were employed. Responsibility of relatives provisions often stand in the way of their securing public aid. "Few girls," writes an agency worker, "separated from their husbands and pregnant

³³ LEONTINE YOUNG, *op. cit. supra* note 29 at 132.

³⁴ For brief discussions of the father of the unwed mother's child, see LEONTINE YOUNG, *ibid.*, Chap. 8; SARA B. EDLIN, *op. cit. supra* note 29, Chap. 15, CECIL J. BARRETT, ADOPTION 32-42 (1952), DR. VIOLA W. BERNARD, *supra* note 28 at 15, Weltha M. Kelley, *Perspectives—Past, Present and Future*, PROCEEDINGS, INSTITUTE OF UNWED PARENTHOOD 40 (1954), Arthur A. Clinco, M.D., *What it Means to be Unwed Parents or the Child of Unwed Parents in Southern California*, PROCEEDINGS, INSTITUTE OF UNWED PARENTHOOD 8 (1954).

by another man, will consent to have the absent husband contacted for support, which they know he will refuse. Most girls who have been divorced are equally adamant about refusing to have their parents contacted. They have often been independent of their families for years and refuse to appeal to [them] for help under such circumstances."³⁵ If the husband or former husband and biological father are not the same, there are added difficulties in making certain that the child is legally free for adoption. The consent of the presumed or legal father must be secured or court action must be taken eliminating the need for such consent.

Married couples who surrender children for adoption even though the marriage continues and the couple live together have problems which may be indicated by the reasons given for the surrender. Illness, marital discord, economic hardship, the child was born just before or just after marriage and is surrendered as an escape from social disapproval, immaturity, and unreadiness to assume the responsibilities of parenthood.³⁶ To this list doubtless should be added cases in which the child was conceived in adultery and occasional cases of complete psychological rejection of the child by one of the parents.

Nonrelative adoptive parents have many problems, say workers in this field, peculiar to their condition and their status. "Adoptive parenthood," writes one such worker, "is inherently more difficult than biological parenthood." The problems that make it so include "coming to terms with infertility, developing a sense of parenthood to a 'ready made' child of other biological parents, interpreting the adoption to family, friends, community, and the child himself."³⁷

The psychological impact of infertility and adjustment to knowledge of it are regarded as central issues in determining qualifications for adoptive parenthood.³⁸ Infertility is described as "a narcissistic blow with resulting emotional trauma." "The sterility itself may of course be an expression of unconscious rejection of parenthood, and most agencies have ruled out couples where no organic reason for sterility can be found. Traditionally, the woman in our society has had a primary function in life — that of

³⁵ Catherine Donnell, *Financial Assistance in an Adoption Agency*, ADOPTION PRINCIPLES AND SERVICES, Family Serv. Ass'n of America 32, 33 (1952).

³⁶ *Final Report, Citizens Committee*, *supra* note 6 at 14, CHILDREN'S BUREAU STATISTICAL SERIES No. 14.

³⁷ Michaels, *supra* note 24, 42.

³⁸ HELENE DEUTCH, *supra* note 29, Chap. 11 *Adoptive Mothers*, particularly p. 397, RUTH BRENNER, A FOLLOWUP STUDY OF ADOPTIVE FAMILIES, Child Adoption Research Committee, New York (March 1951), Family Serv. Ass'n of America, *supra* note 35, FLORENCE G. BROWN, WHAT DO WE SEEK IN ADOPTIVE PARENTS 1, 2. Ruth Michaels, *Special Problems in Case-work with Adoptive Parents*, *supra* note 24, p. 37, Freda M. Kuhlmann and Helen Robinson, *Rorschach Tests as a Diagnostic Tool in Adoption Studies*, Family Serv. Ass'n of America, *supra* note 10, p. 7, 8.

reproducing and caring for children. If she is sterile and unable to assume this role, she may feel she is a failure as a woman. Because of the strong identification that is made between masculinity and the ability to impregnate, the sterile man may be even more threatened than his partner. The realization of sterility in one or the other of the couple is an experience that may create serious disturbance in the marital relationship, and also reactivate feelings of insecurity and inadequacy which may be basic in the total personality problem of the individual.³⁹ It is accordingly, important to know how the prospective adoptive parents have learned to live with the knowledge of their infertility. Is it still so painful they cannot discuss it freely? Do they look upon it as a disgrace? Have they reconciled themselves to it or do they continue to long for children of their own? Can they tell the child, their family and friends about adoption or will they feel impelled to hide their infertility? The answers to these questions may well determine whether the adoptive child will be given a healthy and secure family environment, or, on the contrary, "will be only the symbol of the parents' frustration."⁴⁰

If the prospective adoptive parents have reconciled themselves to infertility and are ready to make the best of it, the next problem "inherent in adoptive parenthood," we are told, is whether they can accept and treat as their own a child born to others. Can they develop some narcissistic identification? On the answer to this question will depend whether they can "relate to him according to his needs, rather than solely out of their own conflicts." "Adoptive parents may well have their own fears," writes Ruth Michaels, "both real and neurotic about the child they adopt. Often the concern they express about his heredity reflects their basic question about whether the child will ever really be theirs, and their guilt and self-depreciation lead them to wonder what kind of child they deserve. Or they may protect themselves from anxiety by placing the blame for failure they expect outside themselves.

"The knowledge that a child was born out of wedlock may reactivate and intensify the adoptive parents unresolved fears and conflicts about sexuality. Even if they have positive information about his good background, they may fear this 'child of lust' (as one man, applying to an adoptive agency, put it) and the potentialities that such a child carries — as aggressor, as rival, as potential delinquent, or as a source of danger and disgrace."⁴¹

³⁹ Kuhlmann and Robinson, *id.* at 8.

⁴⁰ BROWN, *supra* note 38 at 2.

⁴¹ MICHAELS, *supra* note 24 at 39.

From these data, certain conclusions emerge which have an important bearing on the necessary and desirable aspects of an adoption program.

1. An adoption program cannot stand by itself in independence and isolation. Adoption is one method for handling the social and personal problems of some neglected and dependent children. It is only one method and it is only feasible and desirable for some of the children who do not have the care and support of parents and other relatives. It must be weighed in the individual case against alternative methods and to do this effectively requires that the adoption program be closely associated, if not coordinated or integrated, with other child welfare programs. In addition, adoption is one method (and again only one method) of solving the social and personal problems of the biological and of the adoptive parents and this requires close association, if not coordination and integration, with programs designed to aid them.

2. A group of children — we cannot accurately estimate the number but there are ample indications that it is significant — live outside their own homes and those of relatives, have little or no contact with their biological parents or either of them, many of whom are supported at the expense of the public through governmental or private agencies, and yet who are not free for adoption because of the laws governing consent or other legal obstacles. Some of these children are not proper subjects for adoption because they are imbeciles or because of severe psychological, health or personality conditions. Still others are not wanted for adoption because of their age, physical handicap or minority racial status. At least as to some of the rest, however, judicial abandonment proceedings or other proceedings are needed through which the rights of the biological parents may be terminated and the child freed for adoption. which will adequately safeguard the claim of biological parents who have a continuing interest in the child and present or prospective fitness and ability to care for and rear it; which will cut off those parental rights and free the child for the care and upbringing by somebody else when the parents do not have such interest, fitness and ability; and which will insure that the situation of children living outside the homes of parents and relatives are reviewed for these purposes periodically and systematically. Administratively, these proceedings must be closely connected with the adoption program so that adoption may be utilized with maximum ease and effectiveness in those cases in which it is the best method of handling the child's problem, and both must be administratively closely connected to other child care programs so that the latter may be employed when they are appropriate and so that the overall child care program may achieve the social objectives in view

3. To a major extent, adoption is inseparably connected with the prob-

lem of the unwed mother, a problem which is intensified by social stigma and punitive public attitudes, and which consists of a need for money, shelter, medical and hospital care, for time in which to make a deliberate decision about keeping or surrendering the child and, if the latter, through what channels to do it, and for the information and counseling which are indispensable if the decision is to be both satisfactory and permanent.

4. To a lesser but still considerable extent, adoption is inseparably connected with the problem of broken marriages, and particularly with the problem of the mother who once was married, whether to the father of the child or not, but who is now divorced, separated, deserted or widowed. Though the elements comprising her problem may vary in emphasis and in combination, they are essentially the same as those which constitute the problem of the unwed mother.

5. Still to a lesser extent, adoption is inseparably connected with the problem of an adulterous offspring in a marriage that continues and in which the spouse is willing to keep the wayward partner but not the child.

6. Adoption is also connected with the financial, health, psychological and social approval problems of biological parents who are married and living together.

7. To the degree to which this is possible, it must be determined whether the child has conditions of mind, body, or personality — such as feeble-mindedness, incurable mortal ailments, deep-seated psychological or emotional problems — in existence at the time or foreshadowed for the future which would indicate that the child could not benefit from or contribute to family life.

8. To the degree that such is possible, selection among adoptive parents — nine of whom must be turned away for every one accepted, except with respect to hard-to-place children — involves an evaluation of such comparatively simple factors as economic, social, cultural and moral fitness, and such exceedingly complex factors as: the motivations for parenthood; capacity for parenthood, including the capacity to accept and treat as their own a child someone else has borne; reaction and adjustment to knowledge of infertility; the presence of psychological infertility and the stability of the marriage.

With these various factors in mind, the United States Children's Bureau has formulated a statement of objectives for adoption programs which has received wide acceptance: "To protect the child — from unnecessary separation from parents who might give him a good home and loving care if sufficient help and guidance were available to them; from adoption by persons unfit to have responsibility for rearing a child; and — from interference after he has been happily established in his adoptive home, by his

natural parents, who may have some legal claim because of defects in the adoption procedure.

"To protect the natural parents — from hurried decisions to give up a child, made under strain and anxiety

"To protect the adopting parents — from taking responsibility for children about whose heredity or capacity for physical or mental development they know nothing; from later disturbance of their relationship to the child by natural parents whose legal rights had not been given full consideration."⁴²

The extent to which and the manner in which these purposes and factors have been incorporated into California's adoption program will be examined in the following sections of this article.

V. *The Evolution of the Public Program and Controls*

Adoption, that is, the transfer of the legal status of parent and child from one parent to another, did not exist at the common law, though doubtless children were so transferred. Before 1850, some American states by statute authorized adoption through agreement between the biological and adoptive parents expressed in a formally executed instrument.¹ In 1851,

⁴² FEDERAL SECURITY AGENCY, *ESSENTIALS OF ADOPTION LAW AND PROCEDURE*, CHILDREN'S BUREAU, PUBLICATION No. 331 (1949). To achieve these objectives, the United States Children's Bureau recommends the following principles and procedures: (1) The termination of parental rights is as important as the establishment of new parental ties by adoption and should be as securely safeguarded. (2) Placement for adoption should be made only by an agency authorized to make such placements by the State department of public welfare. (3) Adoption proceedings should be in a court of record having jurisdiction over children's cases, in the home State of the petitioners for adoption, and preferably in a local community in which they live and are known and where the child is properly before the court. (4) In every proposed adoption of a child the court should have the benefit of a social study and a recommendation made by the State department of public welfare, or by a local department of public welfare or other public or private child-placing agency designated by the State welfare department. (5) Consent to adoption should be obtained from the natural parents, or, if their parental rights have been legally relinquished or terminated, from a person or agency having legal responsibility for the child and the right to consent to adoption. (6) Court hearings should be closed to the public and the records, because of their confidential nature, should be protected. (7) A period of residence in the adoptive home, preferably for 1 year, should be required before the hearing on the petition, so that the suitability of the proposed adoption may be determined. (8) In the event a final decree is not entered, provision should be made for the removal of a child from a home found to be unsuitable and for his care and guardianship after his removal. (9) Safeguards should be provided in related laws, such as those affecting relinquishment of parental rights, regulation of child-placing services, and determination of guardianship and custody of children, to assure the welfare of the child in all such matters as well as in the adoption proceedings and to define the rights and the obligations of parents. *Id.* at 3-4.

¹ WALTER GELLHORN, *CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY* 239 (Dodd, Mead Co., 1954), Note, *Improving the Adoption Process: The Pennsylvania Adoption Act*, 102 U. OF PA. L. REV. 759 (1954), *Abney v. DeLoach*, 84 Ala. 393, 4 So. 757 (1888), *Succession of Vollmer*, 40 La. Ann. 593, 4 So. 254 (1884)

Massachusetts enacted the first law requiring court action. Today, in one form or another, and with varying degrees of judicial participation, all American states require judicial proceedings.

In California the Legislature provided in 1872: "The person adopting a child, and the child adopted, and the other persons whose consent is necessary, must appear before the County Judge of the county where the person adopting resides, and the necessary consent must thereupon be signed, and an agreement be executed by the person adopting to the effect that the child shall be adopted, and treated in all respects as his own lawful child should be treated." The judge was required "to examine all persons appearing before him" and "if satisfied that the interests of the child will be promoted by the adoption, he must make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting."² In the case of *In re Stevens*,³ this system was subjected to a constitutional challenge on the ground that adoption was a judicial act which therefore constitutionally had to be performed by a court and could not be performed by a judge. This contention was easily and sweepingly dismissed by the State Supreme Court, Thornton, J. saying: "As the legislature has full power over this matter, it may invest any person or officer, or court with the power of receiving, witnessing and declaring the adoption. It may prescribe what the ceremony shall be, and before whom it is to be celebrated. It may make the ceremony so simple that its celebration only requires the consent in writing of the parents of the child, and the acceptance of such consent by the person desiring to adopt, and filing such paper with a public officer."⁴

In 1880 Civil Code Section 226 was modified to require appearance before the Superior Court instead of before the county judge.⁵

In 1905 a petition was required and the word "court" was substituted for the word "judge," making the order a formal order of the court rather than an order made by the judge in chambers.⁶

The theory of the statutes of other states that the parent-child relationship involves something akin to property ownership which could be transferred by contractual arrangements between the parties was thus never fully accepted in California. It was however recognized as a basic underlying proposition. In 1893 the State Supreme Court said: "The adoption of a child under the section of the Civil Code . . . is not a judicial proceeding . . . although the sanction of a judicial officer is required for its con-

² CALIF. STATS. 1872; CALIF. CIV. CODE §§ 226, 227.

³ 83 Cal. 322, 23 Pac. 378 (1890).

⁴ *Id.* at 331, 23 Pac. at 382.

⁵ CALIF. STATS. c. XLI, p.47.

⁶ CALIF. STATS. c. CDXV, p.555.

summation. The proceeding is essentially one of contract between the parties whose consent is required. It is a contract of a very solemn nature, and for this reason the law has wisely thrown around its creation certain safeguards, by requiring, not only that it shall be entered into in the presence of a judge, but also that it shall receive his sanction, which is not to be given until he has satisfied himself" of certain specified things.⁷ In *Estate of Sharon* in 1918⁸ this language was repeated with approval.⁹ In California's early statute this notion was given explicit recognition by the requirement of an agreement on the part of the adopting parent. To this extent it remains in our statutory law today Civil Code Section 227 provides that "the party or parties adopting shall execute or acknowledge an agreement in writing that the child shall be treated in all respects as the lawful child of the party or parties." It survives also in the basic premise of independent adoptions that they are in the nature of a contract between the biological and the adoptive parents. If the rights and duties appertaining to the legal status of parent and child are determined by the laws and the status is fixed by the order of the judge or the court on petition of the adoptive parents and their compliance with certain conditions, and if the former parent-child relationship is terminated by judicial or agency action taken with the consent of the biological parents, neither of these official actions gains any force or effect from an agreement between or by the parties or either of them.

In the early years of the century, the Legislature began to take steps to subject to public regulation private agencies, organizations and societies carrying on functions related to or involved in adoption.¹⁰ In 1903, the Legislature enacted a statute requiring persons conducting a maternity hospital, lying-in-asylum, or a place for the reception and care of children to obtain a license from the county board of health. "The keeping of proper records" was also required and the board of health was authorized to inspect the premises and revoke licenses if the "place is being managed, conducted or maintained without proper regard for the health, comfort, or morality of the inmates."¹¹ It was soon found, however, that this statute did not adequately regulate the "disposal" of children. In its 1908-10 Biennial Report, the State Board of Charities and Corrections wrote: "There has

⁷ In re Johnson, 98 Cal. 531, 538, 33 Pac. 460, 461 (1893)

⁸ 179 Cal. 447, 454, 177 Pac. 283, 286.

⁹ See also In re Williams' Estate, 102 Cal. 70, 36 Pac. 407 (1894), Estate of McKeag, 141 Cal. 403, 74 Pac. 1039 (1903).

¹⁰ For a history of child-caring institutions in California see Mary Stanton, *The Development of Institutional Care of Children in California from 1769 to 1925*, 25 SOC. SERV. REV. 320 (1951).

¹¹ CALIF. STATS. c. CCXXXIX, p.317

developed in this state another abuse of children that should take rank in its iniquity with white-slave traffic and that is a traffic in babies. Under the designation of maternity homes, lying-in hospitals, baby homes or baby farms, there is in existence a class of institutions that traffic in the illegitimate children of unmarried parents. Women who many times move in good society commit sin, and when compelled to face consequences, retire to the privacy of one of these places where for an adequate consideration their shame is covered up and they return again to society with the statement that they have been taking the rest cure. And what becomes of the babe born into the world and abandoned by the natural parents at its very threshold? It is left with the maternity home to dispose of. It will be used, if possible, to furnish an income to the home where it is born and left, and is frequently used for purposes of blackmail. It is impossible to get all the facts concerning these places and this class of cases as all those involved do their best to cover up and conceal. Occasionally, however, a window is broken open and the light thrown in."¹²

The report recommended that "all persons or societies engaged in the conducting of maternity homes, lying-in hospitals, baby-homes, or baby farms, should be compelled to make reports" to the state department "and obtain from said Board annually a permit to engage in said work. It should also be made a misdemeanor with adequate punishment for any person, society, or association, to give away or place out in any home other than that of the immediate relatives any child unless such permit has been first obtained . . ."

In 1911, all child-placing activities, by agencies or individuals, including placements for adoption were put under the licensing power of the State Board of Charities and Corrections;¹³ and, in 1913, boarding homes and institutions conducted as a place for the reception and care of children, maternity hospitals and lying-in asylums were added.¹⁴ In 1911, also, it was provided that parents could relinquish children for adoption by a relinquishment for adoption expressed in writing before an officer authorized to take acknowledgments.¹⁵ In 1913 relinquishment was authorized by a

¹² STATE BOARD OF CHARITIES AND CORRECTIONS, 1908-1910 BIENNIAL REPORT.

¹³ CALIF. STATS. c. 569, p. 1087. It was made a misdemeanor to engage in such placement activity or solicit funds therefor without a license.

¹⁴ CALIF. STATS. (1913) c. 69, p. 73.

¹⁵ CALIF. STATS. c. 569, p. 1087. This provision replaced an 1870 law providing that "The surviving parent of any half orphan child may surrender all control and authority over such child to the Managers of said San Francisco Orphan Asylum Society, or of any other orphan asylum society in this State; and such surrender, made in writing and acknowledged before a Notary Public or magistrate, shall vest in said Managers as full and complete authority over such half orphan as they can legally exercise over any orphan children." CALIF. STATS. (1870) c. 234, p. 335.

writing signed before the secretary of a licensed organization or society engaged in placement of dependent or deserted children.¹⁶

In 1917, relinquishments for adoption taken by child placement agencies were required to be filed with the State Board.¹⁷

The next step in the development of the state's adoption program did not occur for another decade. The law of 1927, however, when it did come, represented a basic innovation. As 1911-1913 were landmark years in the public control of private agencies, so 1927-1931 were in the public control of independent adoptions. In 1927, the Legislature established the principle that social investigation is a minimum essential of effective regulation. The law of 1927 contained these features. It required notice to the State Department of Public Welfare of the pendency of all adoption petitions. It called for state department investigation and report as to whether the child was a proper subject for adoption and as to the suitability of the adoptive home. It provided that all persons whose consent was necessary should appear personally before the county clerk and sign the consent on a form supplied by the state department.¹⁸ Before 1927, a petition for adoption was acted upon by the court without investigation of the condition and circumstances of the child, the biological parents and the adoptive parents. Frequently the petition was filed and the adoption order was granted on the same day.¹⁹ Consent could be signed before any notary

In 1931 the Legislature provided that consent in independent adoption had to be signed before an agent of the State Department of Social Welfare and made it "the duty of the department to ascertain whether the child is a proper subject for adoption and whether the proposed home is suitable for the child, prior to accepting consent of a natural parent to the adoption of the child by the petitioner."²⁰ The state department had found that, under the law as it stood before, "when consent was filed with the petition, the parent gained the impression that his whole responsibility toward the child had been severed by such an act, and if during the investigation it was learned that either the child or the home was not suitable, it was frequently difficult to refer back to the natural parent and to hold him to a legal responsibility. Some parents had gained such an impression of

¹⁶ CALIF. STATS. (1913) c. 92, p. 95. In 1921, Civil Code Section 224 was amended to provide that a relinquishment reciting that the person making it is entitled to sole custody of the minor, when duly acknowledged, shall be prima facie evidence of such person's right to sole custody and sole right to relinquish. CALIF. STATS. (1921) c. 229, p. 307.

¹⁷ CALIF. STATS. c. 558, p. 770.

¹⁸ CALIF. STATS. c. 691, p. 1197. Two bills were introduced in the 1929 session of the Legislature and passed repealing the system established in 1927 but they were pocket-vetoed by the Governor.

¹⁹ REPORT OF THE ADOPTION SURVEY COMMITTEE 1 (1946)

²⁰ CALIF. STATS. c. 1130, p. 2402.

finality that the child was frequently left in unfit surroundings with the petitioners leaving no person or agency responsible for the child."²¹ The requirement of investigation before departmental acceptance of consent, not only protected the adoptive parents by making more certain that they had an adoptable child, and the child, by making more certain that he was going to a suitable home, but it also aided the biological parent. She was necessarily brought into contact with the state department. She could be informed of community, financial and other resources available to her. She was afforded time in which to make her decision. She was given opportunity and knowledge to consider alternatives in making the placement.

The power of the state department, however, was not unlimited in the premises. A restriction was placed on the finality of a refusal or failure by the department to accept a consent. In such cases, the parent was authorized to appeal to the superior court of the county in which the petition was filed and the court, after reviewing a report of the department on its findings, was authorized to allow the signing of consent in open court.²²

The fourteen years following 1931 were characterized by a number of supplementary additions to the adoption law, some relaxation of controls, the testing of various devices, and the repeal and reinstatement of provisions.

In 1935 provision was made for the consent in open court if the state department did not complete its investigation and make its report within one hundred and eighty days after the filing of the petition or any extension of time allowed by the court.²³

In 1937, abrogation of an adoption was authorized if the child developed insanity, feeble-mindedness or epilepsy within five years of the granting of the adoption petition.²⁴ In 1939 the court making such an order was directed to instruct the district attorney or the county probation officer to take proceedings for the institutional commitment of children thus left without parents responsible for them.²⁵ Care of the child during the intervening period was left to the discretion of the court and "liability

²¹ THIRD BIENNIAL REPORT, STATE DEPARTMENT OF SOCIAL WELFARE, July, 1930 - June, 1932, p. 52.

²² CALIF. STATS. c. 1130, p. 2402. In 1931 also the SDSW was directed to give consent in cases in which "(the) consent [of the natural parent or parents] is not necessary and no agency licensed to place children for adoption is a party to the petition" if "the child's welfare will be promoted by the adoption." CALIF. CIV. CODE SEC. 226[4]. State department consent was also made necessary when the biological parents resided outside of California and signed their consent before a notary. CALIF. STATS. (1931) c. 1130, p. 2403.

²³ CALIF. STATS. c. 563, p. 1656; CALIF. CIV. CODE § 226.

²⁴ CALIF. STATS. c. 336, p. 786; CALIF. CIV. CODE § 227b.

²⁵ CALIF. STATS. c. 1102, p. 3035, CALIF. CIV. CODE § 227b.

for support was imposed upon the county until he is able to support himself."²⁶

In 1939 it was provided that "The report of the Department of Social Welfare may be waived by the department in all cases in which a society, licensed by the Department of Social Welfare to place children in homes for adoption, is a party or joins in the petition for adoption. Such waiver may be issued by the department at any time, either before or after the filing of the petition for adoption."²⁷

In 1943 the superior court was authorized to grant an adoption petition without the consent of the State Department of Social Welfare in those cases in which its consent is required and is not given if the court deems that the welfare of the child will be promoted thereby²⁸

In 1945 substantial new controls were imposed on independent adoptions and activities connected with them. It was made a misdemeanor for any unlicensed person or organization to advertise by any public media that he or it will place children for adoption.²⁹ This provision was strengthened in 1951 by subjecting to the misdemeanor penalty a person who advertises that he will accept, supply, provide or obtain children for adoption or who so requests or asks for any child or children for adoption.³⁰ In 1945 Section 224q was added to the Civil Code providing "Any person other than a parent or any organization, association, or corporation that, without holding a valid and unrevoked license or permit to place children for adoption issued by the State Department of Social Welfare, places any child for adoption is guilty of a misdemeanor."³¹

In 1945 consent by parents temporarily outside the state was authorized to be signed before a notary and in such cases the consent of the State Department of Social Welfare (or, later, the county adoption agency) was made necessary³²

In 1947 placements "for adoption" were specifically mentioned in the already existing provision in Welfare and Institutions Code Section 1620 which, together with Section 1629, make all placements of children a misdemeanor when done by any unlicensed person.³³

At the same time in 1945, departmental authority was sharply curtailed in one important respect. It was made the duty of the State Department of Social Welfare (or later the licensed county adoption agency) "to accept

²⁶ CALIF. STATS. c. 1102, p. 3035, CALIF. CIV. CODE § 227c.

²⁷ CALIF. STATS. c. 463, p. 1813, CALIF. CIV. CODE § 226.

²⁸ CALIF. STATS. c. 901, p. 2748; CALIF. CIV. CODE § 226.

²⁹ CALIF. STATS. c. 1317, p. 2468; CALIF. CIV. CODE § 224p.

³⁰ CALIF. STATS. c. 638; CALIF. CIV. CODE § 224p.

³¹ CALIF. STATS., c. 1317, p. 2468.

³² CALIF. STATS. c. 1317, p. 2468; CALIF. CIV. CODE § 226.

³³ CALIF. STATS. c. 1363, p. 2914.

the consent of the natural parents to the adoption of the child by the petitioners," thus reversing the interpretation of Civil Code Section 226 as it stood earlier that acceptance of consents or in other words the right to impose conditions governing the acceptance of consents was a matter lying within the discretion of the department.³⁴

In 1947 a third development of top importance took place; and that year must rank along with 1911-1913 and 1927-1931 in the history of California's adoption program. By the earlier measures, the Legislature had established state department licensing and supervision of private agencies and various regulations and controls of independent adoption activity. Now, the Legislature moved to create public adoption agencies. It authorized the state department to license and finance county agencies "to perform the home-finding and placement functions specified in subdivision (b) of Section 1620 of [the Welfare and Institutions Code], to investigate, examine, and make reports upon petitions for adoption filed in the superior court in that county, to act as a placement agency in the placement of children for adoption, and to perform such other functions in connection with adoption as the State Department of Social Welfare deems necessary, or to do any of them."³⁵

In 1947 also, in addition to authorizing county adoption agencies under the license of the State Department of Social Welfare, the Legislature expanded the supervisory jurisdiction of the state department by bringing to an end certain adoption placements made by probation officers under the supervision of the juvenile court. Welfare and Institutions Code Section 551 had permitted the placement of wards of the juvenile court with families to be members thereof "by legal adoption or otherwise." Welfare and Institutions Code Section 551 was in obvious conflict with Civil Code Section 224q prohibiting placement for adoption by any unlicensed person other than the natural parent. The Legislature in 1947 deleted the words "by legal adoption or otherwise" from Welfare and Institutions Code Section 551 and today probation officers may make such adoption placements only if they have been licensed by the state department as county adoption agencies under Civil Code Section 225m, Welfare and Institutions Code Sections 1640-1644. None of them has been so licensed.³⁶

³⁴ CALIF. STATS. c. 1316, p. 2464. Adoption of Parker, 31 Cal.2d 608, 191 P.2d 420 (1948).

³⁵ CALIF. STATS. c. 529; CALIF. CIV. CODE § 225m.

³⁶ CALIF. STATS., c. 529. In 1947 the Legislature also added provisions that superior court adoption hearings must be private (CALIF. STATS. c. 529, CALIF. CIV. CODE § 226m) and that any report filed by the State Department of Social Welfare or by a county adoption agency recommending denial on the ground that the home of the petitioner is not suitable be immediately referred by the county clerk to the superior court for review. (CALIF. STATS. c. 529; CALIF. CIV. CODE § 226[7].)

The 1949, 1951 and 1953 sessions of the Legislature added only supplementary, minor or corrective provisions to the adoption law

In 1949, it was provided that, once signed, the consent of the natural parents to the adoption can be withdrawn only with court approval, such approval to be given only if "the court finds that withdrawal of the consent to adoption is reasonable in view of all the circumstances, and that withdrawal of the consent will be for the best interests of the child."³⁷ The State Department of Social Welfare or the county adoption agency was required to appear at such court hearings to represent the child.³⁸ In cases of independent adoption in which the department or the county adoption agency recommends denial and in cases in which "the petitioners desire to withdraw the petition for the adoption or to dismiss the proceeding," the state department or the county agency were given the duty to recommend a suitable plan for the child and to appear to represent the child.³⁹ Parental consent was declared unnecessary when a court of another state has freed the child from the custody and control of the parents, or when the parents there "voluntarily in a judicial proceeding surrendered right to the custody and control of such child pursuant to any law of that jurisdiction", or when the parents have relinquished the child to an adoption agency in another state.⁴⁰

In 1951 an amendment authorized the court to retain jurisdiction over a child in an adoption proceeding in cases in which the petition was withdrawn or dismissed.⁴¹ A three year limit was imposed within which a proceeding may be brought to vacate or set aside, an adoption decree "on the ground of any defect or irregularity of procedure in the adoption proceeding." All other actions to set aside adoption decrees were subjected to a five year statute of limitations.⁴²

The 1953 amendments were somewhat more numerous and important. An agency to which a child is relinquished for adoption was made "responsible for the care of the child" and was given "custody and control of the child at all times until a petition for adoption has been granted." Agencies were authorized to terminate "any placement for temporary care, or for adoption" "any time prior to the granting of a petition for adoption." In such event, the child was required to be "returned promptly to the physical

³⁷ CALIF. STATS. c. 731, CALIF. CIV. CODE § 226a.

³⁸ CALIF. STATS. c. 731, CALIF. CIV. CODE § 226a.

³⁹ CALIF. STATS. c. 731, CALIF. CIV. CODE § 226b.

⁴⁰ CALIF. STATS. c. 960; CALIF. CIV. CODE § 224(1)(b), (3).

⁴¹ CALIF. STATS. c. 638, CALIF. CIV. CODE § 226b.

⁴² CALIF. STATS. c. 638, CALIF. CIV. CODE § 227d. Also in 1951 CALIF. STATS. c. 637, CAL. CIV. CODE § 226 was amended to permit licensed county adoption agencies as well as the State Department of Social Welfare to give consent in those cases in which out-of-state parents signed consent before a notary

custody of the agency”⁴³ In those cases in which the court denies the petition and removes a child from the home of adoptive petitioners but does not return the child to his parents, the court was directed to “commit the child to the care of the State Department of Social Welfare or the licensed county adoption agency for that agency to arrange adoptive placement or to make a suitable plan.” In counties not having a licensed adoption agency, the welfare department was designated to act as agent of the state department to “provide care for the child in accordance with rules and regulations established by the department.”⁴⁴

Hospitals and maternity homes were required to send the state department within forty-eight hours after release of a child to the custody of anyone other than a relative by blood or marriage the name and address of the person, organization or corporation receiving the child.⁴⁵ The State Department of Public Health had earlier required such reports as an administrative order.

Parents who are minors were given the right to relinquish children for adoption to a licensed adoption agency and such relinquishments were declared not revocable by reason of minority.⁴⁶ An unmarried, pregnant minor was empowered to give consent to the furnishing of hospital, medical and surgical care related to her pregnancy, such consent being not subject to disaffirmance because of minority. The consent of her parents was made unnecessary to secure such care.⁴⁷

Relinquishments once filed with the State Department of Social Welfare were declared to be “final and binding” and thereafter rescindable “only by the mutual consent of the adoption agency and the parent or parents relinquishing the child.”⁴⁸

The State Department of Social Welfare was authorized to license county adoption agencies to operate in such other counties in their general area as the department deems conducive to the effective and efficient administration of the public adoption program.⁴⁹

VI. *Relinquishment or Agency Adoptions*

The general provisions of the adoption law apply to relinquishment or agency adoptions. There are, in addition, specific provisions in the Civil and Welfare and Institutions Codes which apply only to agencies. Section 1620 of the Welfare and Institutions Code provides: “No person, associa-

⁴³ CALIF. STATS. c. 1122, CALIF. CIV. CODE § 224n.

⁴⁴ CALIF. STATS. c. 1343, CALIF. CIV. CODE § 226c.

⁴⁵ CALIF. STATS. c. 1491, WELF. & INST. CODE § 1620.5.

⁴⁶ CALIF. STATS. c. 1220; CALIF. CIV. CODE § 226[10].

⁴⁷ CALIF. STATS. c. 1654, CALIF. CIV. CODE § 34.5.

⁴⁸ CALIF. STATS. c. 1391, CALIF. CIV. CODE § 224m.

⁴⁹ CALIF. STATS. c. 1342; WELF. & INST. CODE § 1640.

tion, or corporation shall, without first having obtained a written license or permit therefor from the State Department of Social Welfare or from an inspection service approved or accredited by the department:

“(a) Maintain or conduct any institution, boarding home, day nursery, or other place for the reception, or care, of children under sixteen years of age, nor engage in the business of receiving or caring for such children, nor receive nor care for any such child in the absence of its parents or guardian, either with or without compensation.

“(b) Engage in the finding of homes for children under sixteen years of age, or place any such child in any home or other place, either for temporary or permanent care or for adoption.

“The provisions of subdivision (a) do not apply to any hospital or establishment holding a license in good standing issued under the provisions of Chapter 2 or Chapter 3 of Division 20 of the Health and Safety Code. However, where a hospital or establishment holding such a license from the State Department of Public Health provides services not incidental to its primary purpose, the provisions of subdivision (a) continue to apply to the hospital or establishment in respect to such additional services.”

Section 1640 of the Welfare and Institutions Code authorizes the State Department of Social Welfare to license county agencies “to perform the home-finding and placement functions specified in subsection (b) of Section 1620 of this Code, to act as a placement agency in the placement of children for adoption, to accept relinquishments for adoption, and to perform such other functions in connection with adoption as the State Department of Social Welfare deems necessary, or to do any of them.” Under Welfare and Institutions Code Sections 1623 and 1624 licenses issued to public or private adoption agencies may not continue indefinitely or be made automatically renewable; they “expire twelve months from date of issue.” Sweeping rule-making and inspection powers are vested in the State Department of Social Welfare by Welfare and Institutions Code Section 1621. Thereunder the department may “make such rules and regulations as it deems best for the government of any institution or for the performance of any service” specified in Welfare and Institutions Code Section 1620 and may “inspect and examine any such institution, home, or place, or the performance of any such service.” Civil Code Section 224m authorizes parents to relinquish their children to a licensed adoption agency by a written statement signed before two subscribing witnesses and acknowledged before an authorized official of the agency. By the same section, such relinquishment is made of no effect whatsoever until a certified copy is filed with the State Department of Social Welfare, after which it is final and binding and may be rescinded only by the mutual consent of the adop-

tion agency and the parent or parents relinquishing the child. Civil Code Section 224n grants to the agency rights of custody and control of children so relinquished to it and imposes on it responsibility for the care of such children until a petition for adoption has been granted. Civil Code Section 224n also empowers the agency, at its discretion, to terminate any placement for adoption at any time prior to the granting of a petition for adoption and, upon such termination, requires that the child "shall be returned promptly to the physical custody of the agency." Civil Code Section 226 says the state department "may" waive the report and recommendation required of the department or county adoption agencies in all cases (except stepparent cases) in which a licensed agency "is a party or joins in the petition for adoption."

Pursuant to these provisions and to the license and rules issued by the State Department of Social Welfare, adoption agencies, public and private, have the following functions and duties: to accept parental relinquishments of children for purposes of adoption; to take the custody and control of children so relinquished and to assume responsibility for their care until they have been adopted; to find homes for children relinquished to them and to place children in such homes for adoption; to share responsibility with the adoptive parents prior to adoption for children placed with them; to withdraw the children from prospective adoptive homes in which they have been placed and to regain physical custody of them if developing or newly discovered elements in the child or the home make such action advisable; to join with the adopting parents in the petition of adoption.

The functions and duties assigned by the Civil and Welfare and Institutions Codes to the State Department of Social Welfare with respect to adoption agencies are: to grant licenses to public and private agencies and to make a redetermination about their issue annually; to exercise the inspection and rule-making functions and thereunder to issue such regulations as "it deems best"; through the licensing and rule making powers, to supervise the administration of adoption agencies; to accept relinquishments for filing; through its agents, the county adoption agencies, or directly through its own staff, to report and recommend to the court on adoption petitions or to issue a waiver of such reports and recommendations.

The detailed and meticulous way in which the state department has utilized its statutory powers and carried out its statutory duties can be seen from a glance at the department's Manual of Adoption Policies and Procedures. In that manual the regulations dealing with the principles to be applied and the services to be rendered by adoption agencies are extensive. Detailed consideration is given and standards laid down for agency treatment of the biological parents, the child and the adoptive couple.

The agency must proceed upon the assumption that, in our culture and under our laws, the biological parents have the right to custody and control of children born to them and along with it the responsibility for their support, care and upbringing. The surrender of that right and that responsibility should not occur lightly or hastily. It should not occur at all under the emotional stresses connected with childbirth, in the plight often experienced by the unmarried mother, prodded or compelled by temporary emergencies, or made necessary by poverty or straitened financial circumstances. Consequently, when they employ the agency method of adoption, biological parents must be counseled as to the alternatives available to them, must be put in contact with agencies which may be able to give them financial help if that is what they need and, if there are such agencies in the community, must be encouraged to consider the welfare of the child as well as their own welfare, and must be given time for a deliberate decision. The agencies, says the Adoption Manual, shall adhere to these principles in carrying out all child placement functions: "A child's own home and family are the natural setting in which the child's social and personality growth normally occur and his own home and family are a basic right of each child. The child's own family should be assisted in every possible way to meet the child's needs in his own home. Primary emphasis shall be placed upon skillful and understanding professional services to parents" and a child should be accepted for adoption study and placement "only after efforts to bring about favorable conditions within the home for normal development have been unsuccessful."¹ Accordingly, the agencies are required to provide "adequate services to natural parents, including counseling, referral to other agencies when indicated," and to see "that help is given to parents in thinking through and making the best plan for the child."² The agency may accept a relinquishment only after determining: "(a) That the parents have come to the decision to surrender him with knowledge that all ties will be permanently severed with the surrender, full awareness of all the implications, and with knowledge of other resources available to them. (b) That adoption is for the child's best interests. (c) That the child is legally free for adoption. (d) That the child is a proper subject for adoption. No relinquishment can be accepted before the child is born or while the mother is still in the hospital."³ A study of the natural parents must be made which includes: "The history and family background of each, their marital status, education, occupation, citizenship, health — physical and mental — religion and religious prefer-

¹ ADOPTION MANUAL § 2420-00-II-1.

² ADOPTION MANUAL § 2420-II-2.

³ ADOPTION MANUAL §2420-II-2.

ences for the child, temperament and personality”⁴ The relatives of the parents, i.e., their parents and siblings, also must be studied to determine educational and occupational patterns in the family and the presence of any unusual illness, physical or mental, “or nervous defects, epilepsy, feeble-mindedness, tuberculosis, diabetes, eczema, or allergies, commitments to hospitals . . . or prisons.”⁵

With respect to the child himself, the manual declares “the focus of the agency shall be on finding homes for children for whom adoption appears to be the best plan, rather than on providing children for applicants.”⁶ The agency accordingly, is required to place “special emphasis on the study of the individual child and his needs,” so that “it may select the home which will offer the best potentialities for his full development.”⁷ That study must include: birth certificate or other verified information establishing the child’s identity; complications of pregnancy and birth and the condition of the child at birth, secured from the physician attending delivery; psychometric and psychiatric reports if these are indicated by observation of the child or knowledge of his background, progress of the child’s growth and development; attention to hereditary factors in the maternal and paternal histories; “the economic and social adjustment of the immediate relatives;” and the behavior of the child “as a knowledge of characteristic reactions and his responses are important guides in selecting

⁴ ADOPTION MANUAL § 2420-II-2 and § 2400-00.

⁵ ADOPTION MANUAL § 2440-00. The time it takes to do all this can be seen from the following table.

RELINQUISHMENT ADOPTIONS: Elapsed Time between Date Parent Accepted for Study and Date Child Legally Freed, by Type of Adoption Agency—1953

Elapsed Time	Total		TYPE OF AGENCY			
	Number	Percent	Public Agency Number	Public Agency Percent	Private Agency Number	Private Agency Percent
Total	1,126	100.0	591	100.0	535	100.0
Less than 1 month	103	9.1	68	11.5	35	6.6
1 month, less than 3 months	386	34.4	204	34.5	182	34.0
3 months, less than 6 months	418	37.1	183	31.0	235	43.9
6 months and over	219(1)	19.4	136(1)	23.0	83	15.5

(1) Includes 7 cases for which elapsed time was not reported.

State Department of Social Welfare, Bureau of Research and Statistics, Feb. 1955

The median time involved in work with the natural parent up to relinquishment is about the same for both public and private agencies—a little more than three months. Public agencies showed a larger proportion of children relinquished (or otherwise legally freed) in less than three months than did private agencies. However, the private agencies show a larger proportion legally free within six months of study and a smaller proportion extending beyond six months. These data suggest that public agencies may take relinquishments more readily than private agencies in early periods of work with the parent. On the other hand, private agencies obtain more relinquishments within the six-month period.

⁶ ADOPTION MANUAL § 2420-00.

⁷ ADOPTION MANUAL § 2420-00.

the right family for the child, estimating his aggressiveness or timidity, sociability or seclusiveness, adaptability, emotional security . . .⁸

In prescribing agency relations with and services to adoptive parents, the Adoption Manual first says that no child may be placed in an adoptive home until all of the necessary relinquishments have been secured and filed with the State Department of Social Welfare and it has been determined that the child is adoptable. It then requires a thorough investigation of the prospective adoptive parents "to determine their fitness as parents and the suitability of their home for the particular child."⁹ The agency must keep a list of approved homes sufficiently large to provide wide choice from which to select the home best meeting the needs of the individual child. In selecting the home, the agency is required to give consideration to the age of the prospective adoptive parents, their health, mentality, personality, character, religion, cultural background and status, education, financial security, standard of living, marital status, harmony of home life, understanding of children and motives for adoption.¹⁰

Adoptive homes cannot be approved. if the application is made by a single person—widowed, divorced, or unmarried, if the application involves a placement commitment of a particular child which does not leave the agency free to place the child elsewhere if it deems that in his best interest; if any person in the home has a physical or mental condition which would be damaging to the child, impair the ability of the parents to care for it, or indicate that one of them does not have a normal life expectancy; "if the family income, financial resources, and past and present employment are such as to indicate inability to provide adequate standards of health and education and opportunities for normal development."¹¹

If the applicants are not citizens of the United States or the woman is more than forty and the man more than forty-five years of age (and they

⁸ ADOPTION MANUAL § 2430-00. In almost half of the relinquishment adoptions completed in 1953, the children were placed within three months after being accepted for care and three-fourths were placed within six months.

RELINQUISHMENT ADOPTIONS: Elapsed Time between Date Child Accepted for Care and Date of Placement — 1953

Elapsed Time	Number	Total	Percent
Total	1,126		100.0
Less than 1 month	44		3.9
1 month, less than 3 months	484		43.0
3 months, less than 6 months	305		27.1
6 months and over	293		26.0

State Department of Social Welfare, Bureau of Research and Statistics, Feb. 1955

⁹ ADOPTION MANUAL § 2420-00.

¹⁰ ADOPTION MANUAL § 2420-00-II-2 and § 2450-00.

¹¹ ADOPTION MANUAL § 2460-00.

are applying to adopt an infant) the application will normally be denied, unless the agency has special need for the home.¹²

The manual provides that the racial background of the child and adopting parents "should be similar" and that the religious faith of the adoptive parents "shall be" the same as that of the child or his biological parents. An exception to this requirement can be made "only in accordance with the expressed wishes of the parent or parents."¹³ "The personality, temperament, education, intelligence and cultural level, stature and coloring of the adoptive parents shall be considered in relation to the personality, temperament, physical appearance, coloring, cultural background, and potential mental ability of the child."¹⁴

Provision is made for a supervised interim period between placement and adoption, usually one year.¹⁵

The identity of the adoptive parents may not be revealed to the natural parents. Adoptive parents may be told the names of natural parents at the time of adoption.¹⁶

The extensive regulatory system thus established seems on the whole reasonably well adapted to the achievement of the objectives of the program. True, as I shall indicate in a moment, there are serious questions about various provisions, but these are administratively correctable and in any event, however important, are confined to a relatively narrow area. Outside of that area, the administrative rules and requirements are designed to impel a searching inquiry into factors and a determination based upon tests that have a direct bearing upon the protection of the interests of the biological parents, the child and the adoptive couple.

The emphasis upon discussions with the biological parents, upon services to them, upon assisting them to contact their community facilities and resources, upon not taking relinquishments until after the mother has left the hospital, tends to make as certain as precautions can that the child is not unnecessarily separated from his biological parents, that their decision to relinquish him is made with knowledge of alternatives open to them, that they have had aid, time and opportunity to consider all the factors, that they are aware of the consequences and finality of the relinquishment. The marital status of the biological parents, their previous marriages and divorces, must be discovered in order to determine whether all necessary relinquishments have been secured. Ancestral health, mental and physical, past hospital commitments, and diseases endured may have an important

¹² ADOPTION MANUAL § 2460-00.

¹³ ADOPTION MANUAL § 2460-00.

¹⁴ ADOPTION MANUAL § 2460-00.

¹⁵ ADOPTION MANUAL § 2475-00.

¹⁶ ADOPTION MANUAL § 2420-00.

bearing on the health of the child, his mental and physical susceptibilities and characteristics and perhaps even his temperament. With respect to the child itself, certainly establishment of its identity, knowledge of the conditions of pregnancy and birth, awareness of hereditarily transmissible factors and observation of the child itself — with psychometric and psychiatric studies only if the foregoing factors indicate that these are desirable — all of these are necessary if the adoptability of the child is to be determined and an adoptive couple selected in the light of his particular needs. The fitness of the adoptive couple and the suitability of their home can only be assessed if there is an investigation of their age, health, mentality, personality, character, financial security, standard of living, marital status, harmony of home life, understanding of children, and motives for adoption. If single persons were accepted, the child would grow up without the advantages of a father or mother, as the case might be, or, in the event the adoptive parent should marry, without a determination of the fitness of the spouse as a parent. Health conditions damaging to the child or impairing the adoptive parents' ability to care for it, and below-minimum financial security and income will not be contested as conditions properly precluding approval of an application.

The propriety of considering these various factors in the situation and make-up of the biological parents, the child and the adoptive couple, and the emphasis given to them are not open to serious challenge. Serious questions, however, do arise as to the relevance or weight of other factors treated in the Adoption Manual with the same or greater emphasis.

What is the relevance of educational or occupational patterns of the biological ancestors or of the cultural background and present education of the adoptive parents? Even granting that bright children should be placed with bright parents, educational patterns among the biological ancestors are not any necessary measure of the child's intelligence; nor is the lack of cultural and educational status any test of the educational aspirations adoptive parents may have for their adoptive children. To some extent, the Adoption Manual rules were framed to apply not only to adoption placements but also to other placements. Cultural and educational matching of biological and foster parents may be important in the case of older children temporarily placed with foster parents and presently to return to their biological parents. In such cases too great a cultural and educational difference may result in an adverse reaction on the part of the child either to the foster home or later to the biological home. Moreover, these considerations are particularly emphasized in the manual in the requirements for study of the two sets of parents and the child. But they are not confined to the temporary foster home placement or to the study re-

quirements; and a policy of matching cultural, educational and, particularly, occupational backgrounds of biological and adoptive parents, at least when the adoption placement is of a very young child, is in a sense a contradiction of the ideal of a free society that individuals will not be tied to their ancestral place in the world but will have their station determined by their individual merits. A bright child, if his intelligence can be determined by the time of placement, might well be placed with a professional family though he comes from a long background of poverty and ignorance; and, vice-versa.

Citizenship is another factor given far more weight than it can properly claim in the light of the purposes of the adoption program. There are circumstances in which citizenship should be considered. When, for example, it has a bearing on the opportunity of the adoptive couple to earn a livelihood or on their necessity to move out of the community before adoption is completed. Outside of these occasional circumstances, what is the significance of the citizenship of the biological or adoptive parents to the human and social purposes in an adoption program? The child is in no less need of a home because his biological parents were aliens; and the fact of alienage may not affect in the slightest the capacity of a prospective adoptive couple to meet the needs of the particular child. Yet the Adoption Manual does not establish citizenship as a criterion to be considered in appropriate circumstances. It provides for the automatic rejection of applications of adoptive couples who are not citizens unless the agency has special need for the home.¹⁷

Finally, what about race and religion? The administrative identity of religion requirement is mandatory. It is thus far more rigid and sweeping than the statutes in many states which permit exceptions "when it is not practicable" to place children with adoptive parents having their religion or that of their biological parents.¹⁸ What is the purpose of this mandatory requirement? Is it related to the best interests of the child?

It is significant that the requirement applies to children of all ages, to older children with definite religious consciousness and preferences as well as to the new-born infant. To place an older child with fixed religious commitments in a family of a different religion may result in emotional disturbance to the child and a bad home situation. No such consequences can follow from any placement of a child who is too young to have received religious instruction. Even in the case of the older child there may be instances in which he connects his past religion with misfortune and in which

¹⁷ ADOPTION MANUAL § 2460-00.

¹⁸ Note, *Religious Factors in Adoption*, 28 INDIANA L.J. 401 (1953). Note, *Religion As a Factor in Adoption, Guardianship and Custody* 54 COL. L.R. 376 (1954).

it would be desirable therefore to put him in a household of a different faith.¹⁹ Matching the religion of the adoptive parents and the child, if the child himself actually has a religion may very well be in the best interests of the child, but even in this situation, religion is only one factor among many others, no one of which should be automatically controlling if the best interests of the child are to be paramount. When very young children are involved, any requirement of identity of religion between biological and adoptive parents cannot be founded on any consideration of the best interests of the child and an automatic requirement may be very detrimental to them. If the sect is a small one, there may be no suitable adoptive couples, and, even if the religion is a major one in the community, the requirement reduces the number of available adoptive couples and therefore the selection.

The purpose of the requirement, especially in its automatic form, one must conclude, is to fulfill church doctrine, not to promote the secular welfare of the child. It is in effect a state-enforced recruitment or maintenance of church membership provision applicable to the offspring of church members. Moreover, the California rule does not leave enforcement to parental declarations about church affiliation. The Adoption Manual provides. "For all applicants it is desirable to have as one reference the minister or pastor of the church attended by the applicants. For applicants who are members of the Catholic church the agency shall obtain a statement from their parish priest or the local Catholic welfare bureau regarding the catholicity of the applicants."²⁰

Can this state policy and implementing procedure stand in the face of Government Code Section 8400 providing that: "The inclusion of any question relative to an applicant's race or religion in any application blank or form required to be filled in and submitted by an applicant to any department, board, commission, officer, agent, or employee of this State is prohibited" and made a misdemeanor. Should this policy and procedure stand in the face of the policy laid down in Federal and State constitutions guaranteeing freedom of religion and prohibiting religious tests?²¹ Can it stand in our general system of separation between church and state historically impelled, judicially implemented and of as much importance to the church as to the state? The Supreme Judicial Court of Massachusetts recently held, and the United States Supreme Court denied certiorari without opinion, that a less drastic identity of religion clause in the laws of Massachusetts did not violate the First Amendment of the United States Consti-

¹⁹ For an example see *Religious Factors in Adoption*, *Id.* at 405, n.27.

²⁰ ADOPTION MANUAL §§ 2450-00-C-10.

²¹ U. S. CONST. AMEND. I, CALIF. CONST. Art. I, § 4.

tution or the freedom of religion clauses of the Massachusetts constitution.²² "All religions," said the court, "are treated alike. There is no 'subordination' of one sect to another. No burden is placed upon anyone for maintenance of any religion. No exercise of religion is required, prevented or hampered."²³ It may be that the danger from state support of churches is reduced or eliminated by a constitutional requirement of equal treatment of all sects but the wall of separation doctrine precludes such support even though equally distributed; precludes above all else, one would think, a maintenance of membership or recruitment provision enforced by a religious test upon adoptive couples implemented not by the voluntary statements of the adoptive couple but by a variety of references to the religious establishment including a formal certificate.

Moreover, the role attributed in California to the biological parent in this arrangement — permitting her to suspend the requirement and implying that it is controlled by her wishes is oddly in conflict with the total surrender of parental rights and control explicit in a relinquishment.

The administrative rule with respect to race is stated in terms of a general policy rather than as an automatic mandate. Is the justification for this policy founded in the best interests of the child? If a child is conspicuously different racially from his adoptive parents, does this have adverse emotional and psychological effects on the child. Is there a well-established scientific answer to this question? The answer may depend, one might suppose, on the context of racial groups and attitudes in the community. If so, or in any event, should the racial element not be left to evaluation in the individual case? Should the choice not rest primarily with the adoptive couple? Should this question not be considered, too, in the light of the fact that children belonging to minority races are hard to place; that there is an excess of minority-race children over couples of their own race wishing to adopt them. Finally, in a state whose Government Code contains Section 8400 and whose Supreme Court has struck down a law forbidding racial intermarriage on grounds that it was constitutionally repulsive,²⁴ and in a nation whose Supreme Court only recently has held that the Constitution will not tolerate racial segregation in the schools²⁵

²² *Petitions of Goldman*, 54 A.S. 745, 121 N.E.2d 843 (1954), U.S. (1955). The Massachusetts statute provided: "In making orders for adoption, the judge when practicable must give custody only to persons of the same religious faith as that of the child. Mass. Gen. Laws c. 737, Sec. 3. In this case the mother and father were both Catholic. The petitioners were Jewish. The children were transferred when they were two weeks old. The mother consented to having the children raised in the Jewish faith. The trial court found that it was practicable to place the children with Catholics and denied the petition.

²³ *Id.* at 54 A.S. 751, 121 N.E.2d 846.

²⁴ *Perez v. Sharp*, 93 Cal. App.2d 711, 198 P.2d 17 (1948).

²⁵ *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686 (1954).

and which has long declared distinctions based on race "odious to a free people,"²⁶ can it be constitutional or proper policy for an administrative agency of the state to declare, however mildly, that as a general rule children should be placed for adoption only with families of their race?

The questions here suggested with respect to adoption principles are sufficiently serious at least to call for a searching departmental reexamination of the relevant sections of the Manual of Adoption Policies and Procedures. Just such a reexamination is currently in progress and a new manual is in course of preparation.

The importance of leaving these matters in the hands of the administrative agency rather than settling them by legislation is very great. Not only is overall review and revision more feasible administratively than legislatively but, as knowledge and techniques improve in the field, specific adjustments can more easily be made. Most important of all is the need for flexibility and individualization. Generally, the weight to be attributed to any particular element should depend on what other elements are present in the case and how it combines with them. These matters should not be determined by automatic formulas, and, while the elements that should be considered may be listed, (and even here science and experience will suggest additions and deletions from time to time), they cannot be prescribed by mandatory rule. Only very rarely should any one factor be made decisive in all cases, regardless of individual variations, by a fixed and rigid rule. Perhaps oftener it might be proper to ordain the irrelevancy of a factor. A flexible, evaluative and constantly adjusting process such as this is more suitably left to the administrative operation and discretion of the State Department of Social Welfare than controlled by legislative regulation. Adoption standards and principles are to some extent a matter of social and community mores, habits and beliefs. They are to some extent the product of medical and psychological knowledge and investigation. They are to some extent the product of the common knowledge and experience of workers in the field. But whatever the source, they are much more a matter of discovery and development than of legislative fiat.

Within this statutory and administrative framework, there has been a phenomenal growth in the number of public and private adoption agencies since 1947. Before that date, there were only two such agencies in existence in the whole of California. The Children's Home Society, formed in 1891 and still operating; and the Native Sons and Daughters Central Committee on Homeless Children, started in 1909 and ended in 1947. Today there are

²⁶ *Hirabayashi v. United States*, 320 U.S. 81, 63 S. Ct. 1375, 1385 (1947)

sixteen public adoption agencies²⁷ — all county welfare departments — and nine private.²⁸ The following table shows the year-by-year increase in agency caseload since 1948, when the first two public agencies were licensed.

Relinquishment Adoptions

Total for fiscal year	CHILDREN	
	Accepted for study	Placed for adoption
1948	1,201	596
1949	1,807	660
1950	2,085	872
1951	2,304	1,065
1952	2,614	1,338
1953	3,109	1,746

State Department of Social Welfare Annual Report, 1955

There was nearly a twenty per cent increase in the number of children accepted for study (from 2614 to 3109) from the fiscal year 1952-1953 to 1953-1954; and a thirty per cent increase in the number of children placed (from 1338 to 1746) In 1953-1954, sixty-two per cent of the children accepted for pre-placement study and sixty per cent of the children placed by agencies were accepted and placed by county agencies.

The special merit of the agency system, private and public, is that it is better geared than any other to the protection of the multiple interests involved — those of the child, the biological parents, the adoptive couple and the community. Even if, as the writer has argued, some of the administrative rules and requirements are unfounded, unwise or unconstitutional these only detract from, they do not destroy, the major features and benefits of the program. Biological parents are given counsel, aid and time. Since roughly three-quarters of the mothers are unmarried, special attention is paid to problems connected with out of wedlock births as they bear upon the decision to retain or give up the child. Perhaps the greatest evidence of the importance of this process is the fact that more than forty-five per cent of the mothers who come to adoption agencies in the end do not relin-

²⁷ San Diego, licensed 1949; Fresno, licensed 1949; Tulare, licensed 1949; Alameda, licensed 1949; Stanislaus, licensed 1950; San Francisco, licensed 1950; Contra Costa, licensed 1950; San Mateo, licensed 1950; San Bernardino, licensed 1951, San Luis Obispo, licensed 1952; Sacramento, licensed 1952; San Joaquin, licensed 1954, Solano, licensed 1955.

²⁸ Of the nine private agencies placing children for adoption, four are specialized agencies limiting their services to adoptions. They are: The Children's Home Society of California, 1891, The Adoption Institute, Inglewood, 1948; The Holy Family Adoption Service, Los Angeles, 1949; The Infant of Prague Adoption Service, Fresno, 1953. The remaining five provide adoption service as a part of their child placing or institutional programs. They are: Homewood Terrace, San Francisco, adoption license 1949; Vista Del Mar Child Adoption Service, Los Angeles, adoption license 1949; Catholic Social Service of the Archdiocese of San Francisco, adoption license 1952, The Family and Children's Agency of San Francisco, adoption license 1952; Edgewood, San Francisco, adoption license 1954.

quish their children for adoption.²⁹ The mothers who do decide on relinquishment are more likely to have reached a decision that they can live with permanently. The direct benefits of agency service to the child are these: It makes certain that his separation from his biological parents is necessary. It provides him with care and supervision until he is placed for adoption. It studies his personality, heredity, aptitudes and physical and mental equipment to determine the kind of home he needs. From among available couples, it seeks to select the one best able to give him what he needs. It retains responsibility for him until it is satisfied that adoption is right for him. The agency serves the adoptive parents, by giving them a child which is adoptable, i.e., not feebleminded or having other defects of a serious nature; by giving them a child whose needs they are not only able but especially qualified to meet; by giving them every assurance that the child is legally free for adoption and that all necessary relinquishments have been procured, by concealing their identity from the biological parents and thus protecting them against harassment and future efforts to regain custody and control, by supplying them with information about the child's background which will be helpful in his upbringing; by aiding them in making adjustments and meeting problems which may arise in the period after the child has been placed with them and before adoption, and by joining with them in the adoption petition.

It may well be that these various protections are not always or completely achieved. There are inescapable limitations on the number and quality of staff. There are errors of judgment and interpretation of data. The balancing of the interests involves weighing imponderables. In the end, too, psychology and psychiatry still have much to learn and to reveal about the nature of man and the particular problems of these groups, even if case workers generally were masters of existing knowledge in these areas. Within all of these conceded limitations, however, the agency system does operate upon a principle of the evaluation and protection of the interests involved and it succeeds with a reasonable degree of satisfaction in a high percentage of the cases. In only one per cent of agency cases are there denials or dismissals of the adoption petition.

The McDonald Case

In the *Matter of the Adoption of Patricia McDonald*,³⁰ handed down October 15, 1954, the State Supreme Court rendered a decision bearing

²⁹ This 45 per cent probably includes mothers from whom relinquishments are not taken for reasons other than a deliberate and careful decision on the part of the mother not to relinquish the child. The agency may find that the child is not legally free for adoption or that the child is not a proper subject for adoption. These reasons too, however, have an appropriate bearing on the importance of pre-surrender discussions with the mother.

³⁰ In re Adoption of McDonald, 43 A.C. 453, 274 P.2d 860 (1954).

heavily on the responsibility and control of agencies in matters affecting the adoption of children relinquished to them and particularly on the role of such agencies vis-a-viz the courts. The precise issue was whether the agency must approve the adoption of a child relinquished to it and placed by it before the court can grant a petition for adoption.

The agency had placed a child relinquished to it with an adoptive couple three weeks after its birth. Eight months after placement, the adoptive father committed suicide. The agency demanded the return of the child. The adoptive mother refused to surrender it and filed a petition for adoption in the superior court. The court held that the consent or approval of the agency was not necessary and granted the petition as in the best interests of the child.

The State Supreme Court affirmed the decision of the trial court, concluding "not only that no requirement of consent by the agency can reasonably be implied from the code sections — Civil Code 221, 224, 224m and 226 — but that the court is expressly empowered thereunder if it deems the welfare of the child will be promoted by the adoption, to grant the petition without such consent."³¹ The language so "expressly" empowering the court was identified as occurring in paragraph 11 of Civil Code Section 226. The court also relied on confirmatory inaction by the 1953 Session of the Legislature and on an argument from the general purpose and character of the adoption law. It particularly rejected the contention that the agency which has received a relinquishment stands in the same position as the parents of the child, with the same right to withhold consent to adoption; and the further contention that if the power to consent is denied the agency the exclusiveness of its placement function under Civil Code Sections 224p and 224q and Welfare and Institutions Code Section 1629 will be subverted. It completely ignored the argument, pressed upon it with great vigor,³² that a long standing administrative construction — supported by rulings of the Attorney General and concurred in by the Legislature which reenacted the statute with knowledge of the construction — required such consent, presumably on the ground that administrative constructions should only be given weight if the statutory language is not clear.

Paragraph 11 of Civil Code Section 226, the key to the court's opinion, states: "If for a period of 180 days from the date of filing the petition, or upon the expiration of any extension of said period granted by the court, the Department of Social Welfare or the licensed county adoption agency fails or refuses to accept the consent of the natural parent or parents to

³¹ *Id.* at 458, 274 P.2d at 862.

³² Brief of Holy Family Adoption Service as *Amicus Curiae* and brief of Attorney General as *Amicus Curiae*, In Matter of Adoption of Donna Lynn Prior, 43 A.C. 467, 274 P.2d. 637 (1954).

the adoption, or if said department or agency fails or refuses to file or to give its consent to an adoption in those cases where its consent is required by this chapter, either the natural parent or parents or the petitioner may appeal from such failure or refusal to the superior court of the county in which the petition is filed, in which event the clerk shall immediately notify the Department of Social Welfare of such appeal and the department or agency shall within 10 days file a report of its findings and the reasons for its failure or refusal to consent to the adoption or to accept the consent of the natural parent. After the filing of said findings, the court may, if it deems that the welfare of the child will be promoted by said adoption, allow the signing of the consent by the natural parent or parents in open court, or if the appeal be from the refusal of said department or agency to consent thereto, grant the petition without such consent."

According to this paragraph, appeal may be taken to the superior court from the failure or refusal to act of "the State Department of Social Welfare or the licensed county adoption agency." From a failure or refusal to do what? "to accept the consent of the natural parent or parents to the adoption or to file or give consent to an adoption in those cases in which its consent is required by this chapter." In the *McDonald* case, there was no issue involving failure or refusal to accept the consent of the natural parent. Was there then a failure or refusal on the part of the state department or the county adoption agency "to file or give its consent to an adoption in those cases in which its consent is required by this chapter?" It is only if (1) the failure or refusal to act was a failure or refusal by the State Department of Social Welfare or a county adoption agency and (2) the failure or refusal was a failure or refusal to file or give consent "in those cases in which its consent is required by this chapter" that paragraph 11 authorizes the superior court "to grant the petition without such consent."

To take the second point first, paragraph 4 of Civil Code Section 226 and Civil Code Section 224 tell us explicitly what "those cases" are in which state department or county agency consent "is required by this chapter." Paragraph 4 provides. "In all cases in which the consent of the natural parent or parents is not necessary and an agency licensed to place children for adoption is not a party to the petition, the State Department of Social Welfare or the licensed county adoption agency shall, prior to the hearing of the petition, file its consent to the adoption with the clerk of the superior court of the county in which the petition is filed." Was a licensed agency "a party to the petition" in this case? The answer is yes. A party to the petition, under Civil Code Section 226, is a party to the proceedings whether as petitioner or respondent. In paragraph 1, even "joining in the petition" is used in this way. For that phrase is there used to except agencies from

the requirement imposed on natural parents that they sign their consent in the presence of an agent of the State Department of Social Welfare. In paragraph 5, authorizing waiver of reports in agency cases, "party" and "joins in the petition" are redundant expressions. Thus, parties to the petition, and also, under paragraph 1 at least, those who join in the petition, are those who are parties to the proceedings initiated by the petition. If the agency which has placed the child approves the adoption, it is included in the proceedings to indicate that approval; likewise if it disapproves. Being a party to the petition is the same as being a party in a petition action. In this case, there was no doubt as to the agency's status as a party; Holy Family Adoption Service, along with the Los Angeles County Adoption Agency, had been ordered to show cause why the petition should not be granted.

Civil Code Section 224 lists the cases in which the consent of the natural parent or parents is not necessary. They are: (1) cases in which the child has been judicially freed of the custody and control of his parent or parents; (2) cases in which the child has been deserted without provision for its identification; and (3) cases in which the child has been relinquished by its parent or parents to a licensed adoption agency. In the *McDonald* case, the mother had executed such a relinquishment, and, since the child was illegitimate, she could act alone.

Civil Code Section 224 reenforces the interpretation just given of paragraph 4 of Civil Code Section 226. Parental consent is declared unnecessary in relinquishment cases because it has already been secured. A relinquishment is a consent. True, it involves additional elements — transfer of custody of and responsibility for the care and support of the child — but basically it is a parental consent to the surrender of rights to the child. It is so treated by the Adoption Manual when it prescribes the same rules for taking relinquishments and consents,³³ and by Civil Code Section 224m when it prescribes the circumstances and conditions in which relinquishments are authorized. Civil Code Section 224(3) therefore simply recognizes and declares that consents and relinquishments serve the same function and says, in effect, that no further parental consent is necessary after a relinquishment has been taken. No state department or county agency consent being required after a duly executed parental consent, and consents and relinquishments being basically the same, the same rule is now applied to relinquishments. And paragraph 4, Civil Code Section 226, by the exclusion of cases in which agencies are "party to the petition," takes cognizance of this fact. In other cases, cases of abandonment and judicial termination of parental custody and control, the natural parents are out

³³ ADOPTION MANUAL § 2205-00.

of the picture and under paragraph 4 departmental consent is required in lieu of theirs.

Since the present case is one of relinquishment pursuant to Civil Code Section 224(3) and since the agency is a party to the proceedings, thus excluding the case from coverage by paragraph 4 Civil Code Section 226 directing state department or county agency consent, we do not have in the *McDonald* case one of those cases referred to in paragraph 11, Civil Code Section 226 in which the superior court is authorized to grant the petition of adoption without the consent of the state department or county agency if the state department or county agency fails or refuses to give its consent. Paragraph 11, far from settling this case in "clear and precise" language, is simply irrelevant to it.

Paragraph 11 is also entirely inapposite for another reason. It deals only with a failure or refusal to act by the state department or a county adoption agency. In this case the failure or refusal of those agencies was not at stake, although they had failed to file or give consent. True, Los Angeles County reported and made a recommendation against the granting of the petition but that was done pursuant to the investigating and reporting requirements of paragraph 5, Civil Code Section 226, (which of course could have been waived because an agency was a party) and was not pursuant to any consent requirements under paragraph 4. This was a case of refusal, not of failure, and the refusal was the refusal of a private adoption agency—The Holy Family Adoption Service. Private adoption agencies are not mentioned at all in paragraph 11. On a second ground, therefore, paragraph 11 does not "expressly" or otherwise empower the court to grant the petition in this case.

This conclusion is consistent with the over-all purposes of paragraphs 4 and 11 of Civil Code Section 226. Paragraph 4, adopted in 1931, was designed to close a gap in the law. There were children who were not relinquished to agencies having authority over their placement and whose parents were not available or legally entitled to give consent. In addition to abandoned children and those judicially freed, the child in *In re Santos*³⁴ illustrated this point. He was a child whose parents were dead and who was in the care of a guardian whose consent, the court held, was not necessary under the law. The consent of someone or some agency being thought desirable in all cases, this duty was imposed on the state department by paragraph 4. Paragraph 11 evolved through a number of changes out of an effort to limit department power to control adoptions through its authority over consents. Paragraph 11 included consequently not just cases in which the department was directed to give consent and had not done so but also

³⁴ 185 Cal. 127, 195 Pac. 1055 (1921).

cases in which the department refused to accept consents signed by the parents in cases of independent adoption. In 1947 the county adoption agencies were authorized. They were to perform two distinct types of functions: (1) to serve as adoption agencies, i.e., to accept relinquishments of children and to care for and place such children for adoption, and (2) to serve as an administrative agent of the State Department of Social Welfare receiving some of its powers by delegation. The power to accept parental consents signed in the presence of their agents in independent adoption cases was one such delegated power. The power to give consent for the adoption of children not relinquished to it in cases in which parental consent is not necessary was another. The county agency powers referred to in paragraph 11 belong to these two categories of delegated state department power. They are different from the powers of the county agency which belong to it as an adoption agency and are likewise possessed by licensed private agencies to approve or disapprove adoptions in the cases of children relinquished to them as an indispensable feature of their adoption placement function. These are the powers involved in this case.

With the removal of paragraph 11, Civil Code Section 226 from the case, the central support of the court's opinion is withdrawn. On close examination, some of the minor supports also crumble. The court pointed to the fact that in its 1953 Session, the Legislature "refused to enact an amendment . . . that 'a child relinquished for adoption cannot be adopted without consent of the agency to which the child has been relinquished.' " The inference from context is that the law did not require such consent and the Legislature did not want it to. The legislative history of the proposed amendment, however, refutes any such inference. The amendment which had been introduced at the request of the State Department of Social Welfare provided in Section 2 "This act is intended as a clarification of the existing law and is not intended as a change thereof."³⁵ The Assembly adopted the amendment. By the time it was before the Senate Judiciary Committee, the district court of appeals handed down its opinion in the *Kitchens* case,³⁶ holding that agency consent was necessary under the law as it stood. The committee's attention was called to the holding of the *Kitchens* decision. "A member of the committee then stated that in his view the enactment of A. B. No. 1225 was unnecessary in view of the *Kitchens* decision." Thereafter the hearing on the bill was put over at the request of the author and still later at the request of the author the bill was not

³⁵ A.B. 1225.

³⁶ In the Matter of the Adoption of James Kitchens, 116 Cal.App.2d 254,Pac. (1953).

³⁷ In the Matter of the adoption of Donna Lynn Prior, *supra* note 32, Brief of the Attorney General as *Amicus Curiae* in Support of Respondent, at 22-23. In this brief the Attorney Gen-

again set for hearing.³⁷ Thus, not only does this legislative history refute the inference drawn by the Supreme Court, but it has an exactly contrary effect. The Legislature declined to pass the amendment on the authority of a district court of appeals decision that the law already required agency consent.

The court also justified its conclusion on the ground that its construction sustained the object of the adoption laws. For this object, it relied on the much quoted statement in the *Santos* case that: "The main purpose of adoption statutes is the promotion of the welfare of children, bereft of the benefits of the home and care of their real parents, by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child."³⁸ This is better rhetoric than law "Consummation of the closest conceivable counterpart of the relationship of parent and child"¹ For any child? With any adoptive couple? The law makes it plain that the answer is only for a child which is a "proper subject of adoption," only for adoptive couples who have a "suitable home" and only "when the best interests of the child are promoted" by the adoption. When these elements are injected into the rhetoric of the *Santos* case and the machinery which the law elaborates to safeguard and secure these elements is placed in its proper relationship to them, it is clear that the impairment of that machinery and through it the impairment of that purpose which the court sanctioned in this case cannot accurately be described as a construction which sustains the object of the adoption laws.

Much of the difficulty encountered in the *McDonald* case arises from the confusion created by the variety of ways in which the codes and manual sections use the word "consent" and by the persistence of notions that an adoption agency stands *in loco parentis*.³⁹ Sometimes consent refers to parental consent; sometimes to state department or agency consent in non-relinquishment cases, sometimes to agency consent in relinquishment cases; sometimes to consent of the child himself. These various forms of consent cannot be equated or treated as if they involve the same elements and consequences. They express different functions and arise from different relationships. Consent in the case of parents is an expression of willingness and agreement to surrender their rights to their child. State department

eral states that the bill was tabled. This is on the recollection of a representative of the Attorney General's office who was present at the hearing. The representative of the state department who was shepherding the bill gives the version above accepted. The two versions differ only on the technical point and both have the same bearing on the reason for discontinuing effort to secure enactment of the measure.

³⁸ In re Santos, *supra* note 34 at 130-31, 195 Pac. 1057

³⁹ See Brief of Holy Family Adoption Service, *supra* note 32 at 21 ff., Brief of Attorney General, *supra* note 32 at 13 ff., *Hearing, Assembly Committee on Judiciary, Subcommittee on Domestic Relations and Juvenile Court Matters* 29, 47 (Nov. 1954).

and county agency consent in non-relinquishment cases is an exercise of public authority, vested in the absence of parental consent, and exercised on a consideration of the community's interest in the welfare of the child. The department and the agency do not surrender any rights to the child. They have none. In relinquishment cases, agency consent has the same public character, this time, however, exerted after parental consent and in the presence of statutorily created duties to care for the child and hold its custody. It is exercised as an inseparable incident of an adoption placement function and as an act of approval for a particular home as suitable for a particular child. In the case of the child himself, consent is more often an expression of affectional ties on the positive side or negatively an expression of fear of the known or unknown. To cover all of these with the same label is to create an impediment alike to social analysis and statutory construction. While the court recognized that these consents cannot be equated, it failed to follow out the implications of the differences; failed, that is, except in dealing with the question as to whether the agencies stand *in loco parentis*. The right of the parent to withhold consent, said the court, is based on the "natural affection between parent and child," or on "the natural and sacred rights of natural parents to their children." ⁴⁰ These not subsisting between agencies and children, the agency does not have the power to withhold consent. Agencies certainly do not legally or socially stand in the same relation to children as their biological parents — whether the relation between biological parents and children is always or ever quite as here asserted. Hence, any claim of rights based on the identity or similarity of the relationship must fall. The conclusion, however, that therefore agencies possess no power to consent does not follow. They do possess that power but, as indicated earlier, it is derived from a different source.

Under the clear but not always precise language of the statutes, adoption agencies are vested with the function of placing children for adoption. This is expressed in the provisions vesting the authority to license adoption agencies, public and private. Under Welfare and Institutions Code Section 1620 "No person, association, or corporation shall, without having first obtained a written license or permit therefore . . . engage in the finding of homes for children under 16 years of age, or place any such child in any home or other place . . . for adoption." Under Welfare and Institutions Code Section 1640, the State Department is authorized to license county agencies "to act as placement agencies in the placement of children for adoption . . ." Thus, in providing for the existence, licensing and supervision of adoption agencies, public and private, they are specifically assigned the adoption-placement function. This explicit grant is borne out by other

⁴⁰ In the Matter of the Adoption of Patricia McDonald, *supra* note 30 at 464, 274 P.2d 867.

sections — sections which authorize relinquishments to be “acknowledged before an authorized official of an organization licensed by the State Department of Social Welfare to find homes for children and place children in homes for adoption,”⁴¹ excepting from consent-signing requirements agencies “licensed by the State Department of Social Welfare to find homes for children and place children in homes for adoption,”⁴² excepting from other consent requirements agencies “licensed to place children for adoption”⁴³ and so on.⁴⁴ Moreover, the adoption placement function is exclusively vested in licensed adoption agencies, except for the natural parents, not only by the license and the provisions of law dealing with it but by the provision making it a crime for anyone, other than the natural parent or a licensed agency, to place children for adoption.⁴⁵

What is the nature of the adoption placement function thus lodged in licensed adoption agencies and made exclusive to them and natural parents? Before a child can be placed, a decision must be reached as to the home in which to place it. Some homes must be rejected; others accepted. And the law itself lays down the standard of judgment, i.e., the suitability of the home. Thus the adoption placement function involves selection among prospective adoptive couples. It involves, secondly, agency responsibility for the child during the time it has been placed with the adoptive couple down to the time a petition for adoption is granted.⁴⁶ It involves, thirdly, the power to terminate the placement at any time prior to the granting of an adoption petition if, in the judgment of the agency, the home is or becomes unsuitable; and in such event, the adoptive couple is under a statutory obligation to return the child “promptly to the physical custody of the agency”⁴⁷ It involves, fourthly, the duty of the agency to accept the return of the child if the adoptive couple decides not to adopt after the child has been placed with them.⁴⁸

The adoption-placement function as thus set forth by the Legislature, necessarily entails the power to withhold approval and to prevent the placement of a child relinquished to it in homes which are not suitable. Without such power to withhold approval, placement in homes which prove

⁴¹ CALIF. CIV. CODE § 224m.

⁴² CALIF. CIV. CODE § 226[1].

⁴³ CALIF. CIV. CODE § 226[4].

⁴⁴ See also CALIF. CIV. CODE § 226[5] and § 224(3).

⁴⁵ CALIF. CIV. CODE § 224q; see also § 224p.

⁴⁶ CALIF. CIV. CODE § 224n.

⁴⁷ CALIF. CIV. CODE § 224n.

⁴⁸ CALIF. CIV. CODE § 224n. These latter provisions were placed in the law in 1953 but the court stated that their presence “would not affect the result” in the McDonald case “even if they had been in effect at the time the order was entered.” *Supra* note 30 at 457 n. 1, 274 P.2d 862 n. 1. In addition, these provisions were largely declaratory in any event.

unsuitable cannot be terminated because the termination, as happened in the *McDonald* case, can be frustrated by adoption. Without such power, even the original act of placement cannot be controlled by the agency. In fact, the moment a child is relinquished to an agency, it is open to adoption by anyone including those with whom it was not placed.⁴⁹ The selective character of the placement function, the determination of the suitability of the home, the study of the home with the child in it for a trial period, and the exclusiveness of the authority to do these things — all are open to vitiation if the agency does not have the power to withhold approval. That power is thus an inseparable incident of the placement function assigned by the Legislature to licensed adoption agencies and they therefore possess it. There are fair, though not necessarily conclusive, implications to the same effect in the various "agency joins in the petition," agency is "a party to the petition," agency "is a party or joins in the petition" phrases earlier discussed, contained respectively in paragraphs 1, 4 and 5 of Civil Code Section 226. But these are merely confirmatory.

In the judgment of the present writer, therefore, the California Supreme Court erred on both accounts. Paragraph 11 of Civil Code Section 226 does not "expressly" or impliedly authorize the superior court to grant a petition of adoption without the consent of a licensed adoption agency to which the child was relinquished; and the power to stay the granting of the petition of adoption by withholding approval is necessarily included in the powers conferred on licensed agencies in other sections of the Welfare and Institutions and Civil Codes — Welfare and Institutions Code Sections 1620, 1640 and Civil Code Sections 224q, 224p, 224n.

⁴⁹ For examples of these situations see the testimony of Lucille Kennedy, Chief, Division of Child Welfare, State Department of Social Welfare at 36-37, and Walter Heath, Director Los Angeles County Bureau of Adoptions, at 53-54, *Hearings, supra* note 39. In speaking of the *McDonald* decision Heath stated: "I do think it should be corrected. I do think that agencies have been given responsibility for a child which extends to removing the child from any home it sees as unsuitable for the child, and at any time until the adoption has become legal and final through the action of the Superior Court."

"Now if that power is limited by the possibility that a court can grant an adoption, the agency might better not have the power or the responsibility to move a child up until that time. Mainly, I believe, that it is sound procedurally for an agency to have the final say-so in a matter of this sort. To do otherwise, is going to involve people in law suits and appeals and it is going to keep a child from a permanent home in a state of suspended animation, if you can suspend a child, for perhaps several years."

"We have such a case on hand now in Los Angeles. It is a case in which boarding parents whom we were paying to take care of a child decided, after we removed the child from their home, that they wanted to adopt that child. They have filed an independent petition. The child is in an adoptive home. These are good people undoubtedly that were boarding this child and they have known the child longer than the family in which we have placed the child."

"If they win, I think the family whom we placed the child with will likely appeal. They will want to carry the matter further, and this child can be kept in the status of suspended animation for a long time. And this is not an isolated case. We have had others." *Ibid.*

In the judgment of the present writer, there is still another line of reasoning, rejected by the court, which might properly have been determinative of this case. It has to do with the provisions of the statutory law dealing with the powers of the State Department of Social Welfare. Under these provisions, those powers are of such a character and have been exercised in such a way that they reasonably precluded the action taken by the superior court in granting the petition with or without the consent of the private agency which accepted the relinquishment and placed the child. The Supreme Court referred to the statement in Civil Code Section 221 that "any unmarried minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter," and concluded that "the controlling rules are the 'rules prescribed in this chapter,' not the rules of any department or agency, public or private." In reaching this conclusion, the court completely disregarded rules prescribed and authorized in another chapter of another code, which in effect, have substantially modified the provision in Civil Code Section 221 by later legislative enactment. The provision in Civil Code Section 221 remains in its present form, (as is true of many of the sections of the Civil Code dealing with adoption), despite statutory changes affecting it, because all of the relevant provisions of the Civil Code have not been examined and adjusted as numerous changes have been made in the Civil Code and other codes for specific purposes. As an historical matter, this provision of Civil Code Section 221, placed in the Code in 1872 has failed to reflect the much later additions dealing with licensing and the powers of the State Department of Social Welfare instituted at various times but all much later and some of which only recently have been transferred from the Civil Code to the Welfare and Institutions Code.⁵⁰ In fact, no state administrative agency with powers in the field existed in 1872. Hence, the reference in the code section is to "rules prescribed in this chapter," not to rules prescribed or authorized in this chapter. The provisions of the Welfare and Institutions Code which are of much later enactment, in effect have modified Civil Code Section 221 to read. "subject to the rules prescribed or authorized in this chapter or in the Welfare and Institutions Code", though as a result of the way in which the codes have developed and of careless draftsmanship the formal change in language has not been made.

What are the provisions of the Welfare and Institutions Code which have a material bearing on this case? They are Sections 1620b and 1621 forbidding persons not licensed by the State Department of Social Welfare

⁵⁰ The licensing provisions with respect to private agencies which are now in the Welfare and Institutions Code formerly were in the Political Code. Those dealing with public adoption agencies formerly were in the Civil Code.

to place children for adoption and authorizing and directing the State Department of Social Welfare to "make such rules and regulations as it deems best" concerning such placements. Adoption placements made by an adoption agency, accordingly, can only be made if that agency is licensed by the state department and must be made in accordance with such rules and regulations as that department issues and deems best. The rule involved in the *McDonald* case, i.e., the rules that placements cannot be made with single persons, falls within the sweeping rule-making authority thus conferred. The rules thus authorized and issued to govern adoption placements must also govern the judicial determination of "the interests of the child" upon the granting or denial of the petition. The superior court sits in these matters as an administrator, not in the capacity of the reviewer of administrative actions. If the superior court in deciding whether the granting of the petitions will promote the interests of the child need not conform to the rules governing placement, then the two administrators operating in the same area and on the same subject matter may operate on different standards and at cross purposes. The rule-making authority vested in the state department may be countermanded by the discretionary power vested in the court to grant a petition of adoption if it concludes that the interests of the child will be promoted thereby. In this case, there were just such conflicting operations. The department's rule provides: "No application shall be accepted from a single person, whether unmarried, widowed, or divorced."⁵¹ In accordance with this rule, the agency sought to withdraw a child for which it was responsible from the home of the petitioner who was widowed. The superior court granted the petition in contradiction of the rule.

If weight is given to the later and more specific grant of authority to the administrative agency and if the whole theory underlying and justifying specialized administration is given recognition, this sort of conflict must be resolved in favor of superior court compliance with the adoption placement rules of the state department in determining what is in the interests of the child when passing upon an adoption petition.

This is of course not a question of giving weight to an administrative interpretation of a statute whether long-standing and consistent or not. This is a matter of the obligatory character of rules made by and within the authority vested in an administrative agency. The courts are free to give such weight as they please to administrative interpretations. It is by

⁵¹ ADOPTION MANUAL § 2460a. Since under the rules of the Adoption Manual an exception may be made if the status changes after the placement has been made and since the rule as above quoted specifically deals with applications, the court might have concluded that the manual rule did not apply in this case. It did not, however, choose to follow this course but simply proceeded on the assumption that it was not bound by the rules.

their authority that any weight is given. If, as the Supreme Court concluded, the statutory language governing this case was plain, an administrative interpretation of that language should be given no weight at all. The question here is not a rule of interpretation created by the court itself. It is the obligatory character of quasi-legislative rules authorized, directed and made binding by the Legislature, and the courts are controlled by them just as is everybody else.

In any event, whether right or wrong, the *McDonald* case has now been decided. The damaging effects on the agency system of the agency's not having the power to withhold approval of adoption placements and therefore of adoption petitions can now only be corrected by the Legislature. A bill which will preserve the judicial function in adoption cases and at the same time adequately safeguard the proper role of the agencies is now before that body. It is A. B. 925. It amends Civil Code Section 224n by adding the following: "No petition may be filed to adopt a child relinquished to a licensed adoption agency except by the prospective adoptive parents with whom the child has been placed for adoption by the adoption agency. If an agency refuses to consent to the adoption of a child by the person or persons with whom the agency placed the child for adoption, the superior court may nevertheless decree the adoption if it finds that the refusal to consent is arbitrary and capricious."

VII. *Independent or Direct Adoption*

The agency and independent adoption programs differ in important respects. They involve different theories as to the role and function of the state. In the independent adoption program, the State Department of Social Welfare and its agents, the county adoption agencies, exercise a regulatory function, seeking, by various devices and procedures, to regulate activities carried on by others. In the relinquishment program, since 1947, through the rapidly growing county adoption agencies, financed by the state and serving as its agents, the public itself carries on the activities consisting of the rendering of a welfare service. The private adoption agencies, the third and the least of the factors in the field, lie somewhere between the other two. They are much nearer the public than the independent program, since they are philanthropic agencies, financed by public contribution, themselves actually performing the welfare service, and closely controlled by the state through the license and the general and very sweeping rule-making power vested in the State Department of Social Welfare.¹ In all three cases, the public object is the same. To furnish necessary and adequate protections

¹ CALIF. WELF. AND INST. CODE § 1521.

to and thereby safeguard the interests of the community in the child, the natural parents and the adoptive couple.

The important questions concerning independent adoptions, then, are: What are the regulatory devices employed by the state? Are they adequate to the purpose?²

There is no general grant of rule making power as there is with respect to the agency program. All authority exercised therefore must be traced to particular code sections. The devices are these: (1) A prohibition, coupled with a misdemeanor sanction against any person or organization, excepting natural parents and licensed agencies, placing children for adoption or advertising in connection with doing so.³ (2) A requirement that the state department, or its agent, a county adoption agency, conduct an investigation whenever a petition has been filed in an independent adoption case, to determine whether the child is a proper subject for adoption and the adoptive home is suitable;⁴ and a supplementary requirement that the department or agency file with the court a full report of its findings and a recommendation as to whether the petition should be granted or denied; the report and recommendation to be filed within one hundred and eighty days after the filing of the petition or within such extension of time as the court allows.⁵ (3) A requirement that the department or county agency submit to the attorney for the petitioner, or if he has none, to the petitioner, a copy of any report or finding submitted to the court.⁶ (4) A requirement of parental consent, (with a few exceptions),⁷ and that the parents residing in California, sign the consent in the presence of an agent of the state department or county agency on a form prescribed by the state department.⁸ If the department fails or refuses to take such consent, the superior court judge may allow the signing of consent in open court.⁹ Consent once

² For a treatment of independent adoptions in California and elsewhere see: *Final Report, Citizens Committee of California* (1953), *Report, California Adoption Survey Committee* (1946), *Annual Report, State Department of Social Welfare* (1954), *Hearings, Subcommittee on Domestic Relations and Juvenile Court Matters, Assembly Committee on Judiciary*, (Nov. 1954), *Report, Senate Interim Committee on Social Welfare*, Pt. 4 (1953), *Symposium on Adoption* (1953), WALTER GELLHORN, *CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY* (1954), Edwin Lukas, *Babies Are Not Vendible or Expendable*, 5 RECORD OF ASS'N OF THE BAR OF THE CITY OF NEW YORK 88 (1950), Note, *Moppets on the Market. The Problem of Unregulated Adoptions* 59 YALE L. J. 715 (1950), Note, *Improving the Adoption Process: The Pennsylvania Adoption Act*, 102 U. OF PA. L. REV. 759 (1954).

³ CALIF. WELF. AND INST. CODE § 1640, CALIF. CIV. CODE § 224q and § 224p.

⁴ CALIF. CIV. CODE § 226[3].

⁵ CALIF. CIV. CODE § 226[5].

⁶ CALIF. CIV. CODE § 226[6].

⁷ CALIF. CIV. CODE § 224.

⁸ CALIF. CIV. CODE § 226[1].

⁹ CALIF. CIV. CODE § 226[11].

given may not be withdrawn without the permission of the court.¹⁰ (5) A requirement of department consent in cases in which parental consent is not necessary¹¹ or has been signed outside the state¹² if it finds that the child's welfare will be promoted by the adoption and provided that the court may act without such consent if the department fails or refuses to give it.¹³ (6) Requirements that the department or county agency: (a) submit a report and represent the child at the hearing if the parents petition the court for permission to withdraw consent;¹⁴ (b) to recommend a suitable plan for the child and to represent it at the hearing if the adoptive couple ask that the petition be dismissed or if the department or county agency recommends that it be denied.¹⁵ (7) A requirement that the department or county agency accept the commitment of the child if the court sustains its recommendation that the child be removed from the home of the petitioners and does not return to the parents.¹⁶ (8) A requirement that all hospitals and maternity homes send the state department, within 48 hours, an infant dismissal form in all cases in which children are released to persons other than relatives by blood or marriage showing the names and addresses of the persons who received the child.¹⁷

Some of these devices, while a part of the overall regulatory scheme, are either minor parts of it or incidental to it. Recommending a suitable plan for the child if the adoptive couple decide that they do not want it, accepting commitment of it when it is removed from the adoptive home and not returned to the parents, representing it in court when the parents wish to withdraw consent or the adoptive parents wish to dismiss or the department to deny the petition — in all of these circumstances which may happen in any event but which result primarily from inadequate aid to the parents in reaching a solid decision and inadequate prior investigation of the adoptability of the child and the suitability of the adoptive home — the child somehow falls parentless in the gap between natural and adoptive parents. In that event or in the immediate neighborhood of it, these sections assign to somebody — the State Department of Social Welfare or county adoption agency — responsibility for planning and caring for the child. On the theory that somebody must always be responsible for giving the initial consent, department or county agency consent is directed in those comparatively not numerous cases in which parental consent is not

¹⁰ CALIF. CIV. CODE § 226a.

¹¹ CALIF. CIV. CODE § 226[4].

¹² CALIF. CIV. CODE § 226[9].

¹³ CALIF. CIV. CODE § 226[11].

¹⁴ CALIF. CIV. CODE § 226a.

¹⁵ CALIF. CIV. CODE § 226b.

¹⁶ CALIF. CIV. CODE § 226c.

¹⁷ CALIF. WELF. & INST. CODE § 1620.5.

necessary. If parental consent is signed outside the state, some additional precaution, it is felt, should be taken because of the difficulty of making sure that it was properly done in satisfactory circumstances. Department or county agency consent is that additional precaution. The requirement that the department or agency reports be sent to petitioners or their attorneys is designed both to recognize the proper role of lawyers in the process and to give the petitioners opportunity to present their case to the administrators and to the court in the light of department or agency evaluation of their fitness as parents and the suitability of their homes.

The infant dismissal forms, long required by administrative ruling of the Health Department, but only since 1953 by statute, have been a minor device. The volume of such reports has increased since the enactment of the statute, reports since that time being received at the rate of 275 a month. Followup letters are sent to hospitals not reporting properly. If a petition for adoption is not filed within thirty days¹⁸ by the non-relative receiving a child, he is sent a letter pointing out that, if a petition is not filed and the child remains with him, it will be necessary for his home to be licensed to care for the child.¹⁹ No further action based on the infant dismissal form is taken.²⁰

Evasion of the requirement is, of course, easily possible. A child carried from the hospital by a relative can be handed to a third person — the adoptive parent, a lawyer's secretary, a cabdriver — around the corner.

The major regulatory devices now existing in California thus are the criminal prohibition against unauthorized placement for adoption, the taking of consents by the state department or county agency and the departmental or county agency investigation and recommendation. The first of these is the source of much of the current furor. The other two seem to give rise to little criticism.

In his 1953 opinion, the Attorney General dealt with the meaning of placement and the permissible role of third-party intermediaries under the criminal prohibition, Welfare and Institutions Code Section 1620b, Section 1629 and Civil Code Section 224q. He concluded that the third party intermediary could not evade the prohibition "under the guise of acting as agent of the natural parent."²¹ The situation posed by the state department in asking for the opinion was this: "An expectant mother tells her obstetrician that she does not want to keep her baby. The obstetrician informs an attorney who contacts the expectant mother. The attorney tells

¹⁸ Notice of all petitions must be sent to the department or county agency by the clerk of the superior court, CALIF. CIV. CODE § 226[1].

¹⁹ CALIF. WELF. & INST. CODE § 1620b.

²⁰ *Annual Report*, SDSW, 48 (1953-54).

²¹ 53-228, 23 Ops. Atty. Gen. 35 (1953).

her he has a client who wants to adopt the child and who will pay all expenses of confinement and adoption. The expectant mother agrees to the plan. She does not select the people to adopt the child nor does she see them or know their identity. Upon the birth of the child the attorney, through an intermediary, obtains physical custody of the child and has the child delivered to his clients." "This case," said the Attorney General, "is a clear and almost classic violation of Civil Code Section 224q since the attorney did everything necessary to the placing of the child. He did more than perform a legal service and did more than merely recommend the prospective foster home. He actively promoted the placement." The policy embedded in our adoption laws, moreover, "makes it clear that the placing of a child for adoption is an act to which the natural parent is bound to give his or her personal attention and is an act so peculiarly personal that it may not be delegated to an agent."²²

Enforcement of the prohibition of unlicensed placements unless by the parent present unusual difficulties. The Attorney General has ruled that the state department has authority under Government Code Sections 1180 and 1181 to conduct investigations and hold hearings to determine whether persons are engaging in the making of such placements. Such investigations, however, would serve little purpose other than to publicize already known facts. There have been almost no prosecutions for violation of Civil Code Section 224q. Many share the opinion of one Los Angeles County judge: "The average citizen who would serve as a trial juror in the event of criminal prosecution knows nothing of that provision in the law or of the reasons for it. Such a prosecution would doubtless result in an acquittal unless it were shown at the trial that the placement was in a home which is unfit as judged by ordinary standards. It must be admitted that a wise physician may make a placement which is as good or better than that which might be made pursuant to strict legal procedure."²³ More than that, there are in-

²² CALIF. CIV. CODE § 2304.

²³ *Report, California Adoption Survey Committee* 20 (1946) Cf., however, the statement of W. G. La Fever, Los Angeles attorney, and former chairman of the Citizens Committee on Adoptions in California, that "as the day approaches when the present development and expansion of their facilities permit agencies to carry more of the adoption load, so also does the day approach when we are going to see prosecution under this Code section of the unlicensed intermediary placing children for adoption." The Three "Rs" of Adoption—Whose Responsibility, Symposium on Adoption.

The State Department of Social Welfare reports: "There have been two cases of successful prosecution. The first of these involved a woman who had a license to board aged persons and who had offered to a representative of the District Attorney and his wife a child for adoption for \$300. The trial resulted in a conviction for violation of Section 224q of the Civil Code with a fine of \$100 suspended for one year. The District Attorney handled the prosecution.

"The second case involved two women who were charged with paying natural mothers

herent difficulties in the statute and in the situation to which it applies. What is forbidden is the act of placement. It is then, of course, perfectly permissible for parents, expectant parents and persons seeking a child to consult with their doctor, lawyer, minister, high school counselor or friends and for the persons so consulted, with or without fee, to impart advice and information. The no-man's land between the forbidden act and the permitted advice is very large and its boundaries indistinct. The situation posed by the Attorney General presents a clear case of the forbidden act. The situation in which the mother actually selects the adoptive parents — perhaps they are the people downstairs or she has known them for many years — and in which she has consulted her doctor about the effect of adoption upon her child and her lawyer about its legal aspects, presents a clear case of parental placement and permissible advice. To what extent must the parent participate in the selection of the adoptive couple for the placement to be within the law? The state department's answer that she must participate "responsibly," while doubtless an accurate statement of the law, is of little concrete help to the lawyer or doctor who wishes both to stay within the law and to serve the needs of his client. A more detailed set of rules spelling out the concept of responsibility is what is needed and what the department cannot permanently avoid developing. In the meantime, however, Civil Code Section 224q serves as a general legislative expression of disapprobation, a frown on the practice of third party intermediaries. As such, it has its values in constituting pressure in the right direction as the present concern of doctors and lawyers makes clear; and it does, in addition, of course, make criminally liable the flagrant violator. It is important therefore that it remain on the statute books.

Widespread violation of the section is strongly suggested, if not conclusively demonstrated, by the following data regarding acquaintance between parents and petitioners and the person making the placement. In 1953 in 38 per cent of all independent placements in California, the parents made the placement. In 55 per cent of the cases the parents were not acquainted with the petitioners. Of the cases in which the parents and the

for their babies and placing the babies for adoption for a higher fee from adopting parents. Complaints were issued by the District Attorney of the county involved, charging the women with conspiracy in the sale of human beings. They were indicted by the Grand Jury under a section of the Penal Code which prohibits the sale of human beings. The indictment was later changed to accuse the women of conspiracy and violating the Civil Code prohibition against placing children for adoption. The women admitted their guilt and were allowed to plead guilty to the lesser charge. They were sentenced to six months in the county jail but the sentences were suspended and they were placed on probation for three years. The reaction of the unmarried mothers involved and probably that of a large part of the general public was that the women were kindhearted and were attempting to be helpful to girls in trouble and to persons who wished to adopt children." Letter to author from Supervisor, Bureau of Adoptions, Feb. 19, 1955.

petitioners were not acquainted, physicians made the placement in 51.4 per cent, attorneys in 9.6 per cent, relatives and friends in 16.2 per cent, unlicensed officers and agencies about 10 per cent.²⁴ About 15 per cent of all independent adoptions in California were placements with relatives and nine-tenths of these were made by the parents. In 83.4 per cent of the placements neither petitioner was related to the child, physicians place 35.5 per cent of these children and attorneys 6.6 per cent and parents 29.7 per cent.

It is clear from these data that the overwhelming preponderance of independent placements are placements with nonrelatives, that less than 40 per cent of all placements are made by the parents, that well over half are illegally made by third party intermediaries, and that the largest single group of such intermediaries are physicians. That the doctor should be so prominent in the picture results more or less unavoidably from his medical function in caring for the mother before, during and after birth. He cannot ignore her need for other help at the same time. Nor can he easily pass off the urgent requests of sterility patients to solve their problems by an adoptive if not by a biological delivery. Having the source of supply in his care on the one hand, and of demand on the other, and feeling that he is helping to solve the problems of both thereby, he serves as a conduit between them. There is, in addition, a strong financial consideration so far as the mother is concerned. In 58 per cent of the cases in 1953, the adoptive couple paid some or all of the hospital and medical expenses of the birth. Sometimes, instead of arranging the matter himself, the physician refers the mother or expectant mother to an attorney who has among his clients couples seeking a child.

The lawyer is normally drawn into this situation sometimes by reference

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INDEPENDENT ADOPTION

Acquaintanceship of Petitioners and Parents by Person or Agency (1) Making Placement
January-December 1954

Person or Agency Making Placement	Total		Acquaintance of Parent with Petitioners				Were Not	
	Number	Percent	Were Acquainted	Percent	Number	Percent	Number	Percent
Total	3,981	100.0	1,725	100.0	2,172	100.0	84	100.0
Percent	100.0		43.3		54.6		2.1	
Parents	1,512	38.0	1,435	83.2	61	2.8	16	19.0
Relative of Parent	147	3.7	51	3.0	96	4.4	....	.....
Physician	1,176	29.5	57	3.3	1,113	51.4	6	7.1
Attorney	219	5.5	10	0.6	209	9.6	....	....
Friend of Parent	301	7.6	44	2.5	257	11.8	....	....
Probation Officer	102	2.6	30	1.7	68	3.1	4	4.8
Out of State Agency	66	1.6	12	0.7	54	2.5	....	....
Other Welfare Agency	130	3.3	21	1.2	105	4.8	4	4.8
Other	239	6.0	41	2.4	192	8.8	6	7.1
Not Reported	89	2.2	24	1.4	17	0.8	48	57.2

(1) Agencies or officials not licensed to place children for adoption in California.
State Department of Social Welfare, Bureau of Research and Statistics, Nov. 16, 1954.

from a doctor, sometimes because the parent is his client and seeks his help, but most often because the petitioner is his client. It is thus generally the adoptive couple whose interest he serves. In the end, of course, all petitioners have to have a lawyer to handle the court proceedings. Only a handful of lawyers or firms in California are building or have built what might be called an adoption practice. A tabulation of the attorneys' names appearing on adoption petitions filed in a three months period, (August, September, and October, 1954), shows that 1076 petitions were filed by 799 different attorneys or firms of attorneys. Twenty-five petitions were filed by one attorney; 23 by another; two attorneys filed six each; four attorneys filed five each; seven attorneys filed four each; 29 attorneys filed three each; 126 attorneys filed two each; and 629 filed one each. This tabulation does not show that the attorney was involved in any way in arranging the placement. One attorney whose name stands high on this list hires an investigator to collect information on both natural and adoptive parents. He charges a fee for this service to the adopting parents in addition to his legal fee. He sets up a trust fund which the adopting parents furnish from which medical expenses, living expenses, and travel expenses of the mother may be paid. He works with obstetricians practicing in a number of hospitals who refer mothers to him. Would-be adopting parents are referred to him from doctors and other sources and many seek him out voluntarily having heard of his activities.^{24a}

The second major device in the regulation of independent adoptions in California is the requirement that parental consent be signed in the presence of an agent of the state department or county adoption agency. While, on its face, this may seem to be an automatic procedural requirement, and while the state department or county agency is under a statutory duty to accept the consent — the discretionary power of approval or disapproval having been once granted and then withdrawn by the Legislature — the department is of course free to implement it by stating when and where agents will be present to witness the signature and the manner in which this must be done. In exercising this power, the department has set forth rules to make certain that the signature is freely, knowingly, and purposefully given. Consent may not be taken in the hospital or maternity home, thus assuring the mother an opportunity to recover from the physical and emotional experi-

^{24a} "Attorneys are placed in the position now in independent adoptions of being the attorney for two parties to the adoption, the mother and the adopting parents. If he does the best for the mother that he can do, he will get her expenses paid and paid well, sometimes. If he does the best he can do for the adopting parents, he will get them a baby from a good background.

"But I don't know what he does for the child. I don't know that that enters into his conscious arranging of this thing. Maybe it does. But it hasn't been brought out, if that is so." Walter Heath, Los Angeles County Bureau of Adoptions, *Hearings, supra* note 2 at 107.

ence of childbirth before making her decision.²⁵ The agent must inform the parent that the consent is permanent and binding and can be withdrawn only with the permission of the court; that parental rights and responsibilities are not terminated by the consent; that the department is free to recommend denial of the petition for adoption if it thinks that in the best interests of the child, that if the parent is in doubt she should take further time to make up her mind, that in fairness to all parties the execution of the consent should represent as nearly as possible a final decision.²⁶ The state department or county agency has no jurisdiction until the petition has been filed and notice of the pendency of the action is received from the county clerk. Signature of consent will not be witnessed before that time²⁷ and, if possible, sufficient investigation of the case will be made before witnessing consent to determine the advisability of the adoption.²⁸

Since the consent must be specifically to the adoption by the particular petitioners,²⁹ the Adoption Manual provides: "It is the responsibility of the agent taking the consent of the parents to see that the full names of the petitioners appear on the consent at the time the parent signs the form. The information shall be made available to her and she shall not be prevented from reading the names on the consent. The agent shall not refuse to witness the consent even though the parent may not choose to read the names."³⁰ But for this requirement of disclosure written into the law and implemented by this manual section, which embodies what otherwise is regarded as a bad practice, the consent would in effect be signed in blank and the intermediary would be able to dispose of the child when and to whom he wishes and at whatever price he could get. The way would thus be open for a potent source of black market evils.

The requirement that parental consent be signed in the presence of an agent of the state department or county adoption agency is a force in the direction of giving the parent adequate opportunity to come to a calm and lasting decision while fully aware of the nature and consequences of the act of signing consent. As can be seen, the requirement is insufficient to achieve that objective standing by itself. But it makes a substantial contribution toward it.

The third of the major instruments through which public regulation of independent adoptions is sought to be effected in California is the report and recommendation asked of the state department or county adoption

²⁵ ADOPTION MANUAL § 2275-00-A-2.

²⁶ ADOPTION MANUAL § 2275-00-A-4.

²⁷ ADOPTION MANUAL § 2275-00-A-1.

²⁸ ADOPTION MANUAL § 2275-00-A-3.

²⁹ CALIF. CIV. CODE § 226[1].

³⁰ ADOPTION MANUAL § 2240-00.

agency As stated in the statute, the purpose of this investigation is to determine the suitability of the adoptive home and whether the child is a proper subject of adoption.³¹ Since the same code section and purposes apply to the agency study in relinquishment cases, the departmental rules and regulations which govern the character of that study are also applied to the investigation in independent adoption cases. Was the parent's consent voluntary, given with knowledge of alternatives available to her, procured from all the necessary parties? Are the child's health, heredity, intelligence and personality such as to render him a proper subject for adoption? Are the petitioners' motives for adoption sound? Are they of suitable age, health, emotional stability, harmonious home life, understanding of children, financial security, cultural level, and background? Is the child well adjusted in the petitioners' home? Will his full potentialities be developed there? Will the child be brought up in a religious faith acceptable to his natural parents? "If the petitioners are not of the same religious faith as the child's parents," provides the manual, "this subject should be discussed with the natural parents and their express approval should be given before their consent to the adoption is accepted." ³²

In evaluating the usefulness of this device in the regulation of independent adoptions, the central and determinative factors relate to the time of the investigation and report and the advisory character of the recommendation. The state department or county agency is in a position to give some advice to the parents and often some information about the adoptive home. It can also transmit to the adoptive couple some facts about the background of the child gathered from contact with the parents. But these services are incidental to the fact-finding nature of the investigation and are limited by it. Of much greater importance, however, is the circumstance, that the state department or county agency enters the situation only after the petition has been filed, after the child has been born, and after the dynamic point of the whole process has passed, namely, the making of the placement decision. The possibilities of constructive aid or action are over. No alternatives remain but to recommend termination of an already established relationship or to patch up what has been done. A state department determination that the child is not a proper subject for adoption or the adoptive home not suitable is, moreover, not an administrative determination which the courts will sustain if supported by evidence. It is a recommendation only which the courts are free to disregard and which they frequently do. Not only are the courts understandably reluctant to uproot the child again unless very strong reasons can be given, but their judgment may be based

³¹ CALIF. CIV. CODE § 226[3].

³² ADOPTION MANUAL §§ 2330-00, 2350-00, 2360-00, 2370-00.

upon entirely different standards and tests from those employed by the state department or county agency. The law merely provides that "if the findings of the State Department of Social Welfare or the county adoption agency are that the home of the petitioner is not suitable for the child and it recommends that the petition be denied, the county clerk upon receipt of the report of the State Department of Social Welfare or the county adoption agency shall immediately refer it to the superior court for review."³³ The character of the "review" is not specified or limited.

Thus, when the devices are reviewed individually and collectively by which the Legislature, while permitting direct placement by the parent, has sought to regulate independent adoptions and thereby to protect the multiple interests involved, they are seen to be inadequate to the task. In specific areas, they have succeeded in mitigating the harshness of the consequences of the system on the child when he is left without either set of parents or when the adoptive home is positively damaging to him in objectively demonstrable ways. They have supplied minor aids to the biological and adoptive parents but only after it is too late for them to be of value in the constructive making of the critical decisions, even if they were of a more substantial character. They have generally indicated a policy of the Legislature as one of disapproval of existing and wide-spread practices. Singly and in combination, their employment has resulted in decided progress but they leave much yet to be done. It cannot be done by further administrative development through a more effective use of the devices already available, though concrete improvements are still possible in that area. Additional positive programs and controls are necessary and they can only be created by the Legislature.

The basic defect of the system of independent adoptions as it exists in California today, modified to the extent that it is by the devices and controls just discussed, is that it does not sufficiently safeguard the interests of the natural parents, the adoptive parents, and, most serious of all, the child. A well-known practicing doctor has described the process: "In any adoption, *three* parties are involved in a situation which is long-lasting and arouses the strongest emotions. First, there are the *adoptive parents*, who are frequently well known to the doctor. As a sterility patient, the doctor may have seen the wife over a series of visits which were directly concerned with her desire for a child. He has had a pretty good opportunity to judge whether or not she would make a good mother.

"Then there is the *natural parent*. Less frequently does the doctor know her as well. She often is a nonresident who is his patient for only the length of her pregnancy. She has something to conceal and an urgent need to place

³³ CALIF. CIV. CODE § 226[7].

her child. Has she told him the truth about herself and the child's father? Is her child going to be the kind of child the doctor would like his eager adoptive parents to have? Maybe yes — maybe no! But by the time anyone knows for sure, the child is in the home — ties are made. Then who can say how much of the future behavior of the child was due to heredity and how much to living with over-eager, possibly older parents?

"The third party to an adoption is the *child*, whom the obstetrician meets only briefly in the delivery room. Who is looking out for *his* interest? Like a piece of goods, he is passed from one person to another with only the obstetrician to say that he is getting a fair deal. . .

" . . . In general the placement is arranged before delivery and the baby goes directly from the hospital to his new parents. Most adoptive parents immediately file a petition for adoption with the court. They have good reason to do this, for there is an interval of six to eight months before that petition can be granted, and during that time things may happen which are disastrous to one or another of the interested parties. For the adoptive parents, there is the hazard that they will not get the baby after all. Until the final adoption papers are signed, the natural mother is the legal parent of the child; she may repossess him at any time. Adoptive parents, who know this, live in apprehension during this period — hardly the best state of mind in which to start a baby on its life. The hazard for the natural mother is that maybe the adoptive parents will change their minds about adopting the baby and return it to her, thus ruining the life she had commenced to build for herself remains. There is another hazard. If the adoptive parents do not file for adoption, or if they withdraw their petition, there is no check on what becomes of the child."³⁴ From this portrayal, the hazards and disadvantages of independent adoptions may be itemized. They are likely to center on the interest of adults rather than the interests of children, on trying to secure a child for a family rather than a family for a child. One variation of this is the use of the child to attempt to bolster a sagging marriage or to treat an individual's emotional and psychological illnesses. The range and number of prospective adoptive families is likely to be limited and this limits the opportunity of choice for the child. If the adoptive couple declines to accept the child, the doctor or others, having no way to care for it, must hastily find another couple, with all the dangers implicit in this mode of selection for the child. The doctor is likely to know well just the wife or just the husband. The doctor is likely to know little of the background of the child, i.e., the hereditary elements which may have a bearing on the adoptability of the child. The mother's decision,

³⁴ James V Campbell, M.D., *The Physician's Interest in Adoptions*, SYMPOSIUM ON ADOPTION.

made under stress and without knowledge of alternatives, may not be final and she may seek to regain the child later. All of the necessary consents may not be secured and the adoption will therefore be subject to being upset. The biological parents are likely to know who the adoptive parents are or to be able to trace them. The adoptive couple, once accepting the child, may thereafter reject it. The mother may have to take it back or, if she has dropped out of sight, the child may then be handed around in the absence of any continuing responsibility for it from the beginning through adoption.

Some striking illustrations of independent placements in which the county agency recommended denial of the petition were produced by Walter Heath of the Los Angeles County Adoption Agency at the November, 1954 Hearings of the Assembly Committee on Judiciary. They may be classed as "horrible examples" which ought not to serve as the foundation of legislation³⁵ but they nevertheless exist and open the view to many more numerous, less drastic but still undesirable placements. "Here is placement by a doctor and attorney. Petitioners were good. The problem was that the natural and legal father had not been thought of at all in this process. He was in jail at the time. He does not want his child to be adopted. He is now taking legal action to get his child back.

"Here is a placement by an attorney. The man petitioner is sixty-eight years old, woman petitioner is forty-six. They have three other children. With a man sixty-eight, I think it is not likely that the child will have a father during his — this was an infant — during his growing years.

"Here is a placement by a doctor. The problem is that the petitioner has got an interlocutory decree of divorce in July, 1952, and at the time the child was born, the woman [petitioner] was in jail, convicted of grand theft and embezzlement. She was released a short time later and pending her release, the doctor cared for the infant in his own home, so that it could be placed with this fine woman.

"Here is an infant of Mexican parentage, is very dark, was placed by an attorney in a home of light Caucasian people. Petitioners could not be happy with this child and gave it back to the attorney, who in turn put the baby into a very poor home. Now this home, it happens the man is fifty-three and the woman is fifty-nine. This is the second placement of the same child. The woman is suffering from latent syphilis, arterial sclerosis and hypertension heart disease. They have only one bedroom and the child is in the bassinet in their room. That particular case brings out a point which is often overlooked, that independent adoptions are arranged before the baby is ever born, and it might be a good baby for somebody else and these par-

³⁵ See remarks of Assemblyman Tomlinson, *Hearings, Assembly Committee on Judiciary*, 111 (1954).

ents might be fine parents for another baby, but they don't always belong in the same family."³⁶ The state department statistics on reasons for recommending denials and dismissals in independent cases are shown in the following table. Denials were recommended in 16.9 per cent of the cases and dismissals in 3.9 per cent.

REASON FOR RECOMMENDING DENIAL OR DISMISSAL
JANUARY-DECEMBER 1953

Reason	Total		Recommendation		Dismissal	
	Number	Percent	Number	Percent	Number	Percent
Total cases	826	100.0	672	100.0	154	100.0
Parent did not respond	127	15.4	126	18.8	1	0.6
Parent refused consent	198	24.0	156	23.2	42	27.3
Parent's consent withdrawn	10	1.2	6	0.9	4	2.6
Legal status of child not cleared	204	24.7	202	30.1	2	1.3
Child not a proper subject	20	2.4	17	2.5	3	2.0
Child not in petitioner's home	68	8.2	44	6.5	24	15.6
Child or petitioner died	10	1.2	7	1.0	3	1.9
Home not suitable	27	3.3	25	3.7	2	1.3
Petitioner not continuing action in California	134	16.2	79	11.8	55	35.7
Other	28	3.4	10	1.5	18	11.7

About one-half of the recommended denials and dismissals in independent adoptions in 1953 were because the parent refused to consent to the adoption or because the legal status of the child was not clear. Over one-half of the denials were for these reasons and about one-third of the dismissals. Other important reasons for recommending denial or for dismissal were the failure to reach the parent for necessary consent and the unwillingness of the petitioners to proceed with the adoption.

What is the remedy to these evils in independent adoptions? What measures can and should be taken to strengthen the regulatory arm of the state?

1. It must be recognized that the hazards which have been mentioned are inherent in the independent process and exist in placements by natural parents as well as third party intermediaries. All placements by parents are not good and all placements by intermediaries are not bad. The hazards in independent adoptions, consequently, would continue to exist even if all present irregular and illegal placements were brought to an end. Some parents after transferring custody would still refuse to consent and would later reclaim their child. Some parents would still disappear without consenting or refusing to consent. Some parents would still give incorrect information on their parental status and the legal status of the child. Some children would still be placed in very unsuitable homes. Some children after placement would still prove to be improper subjects for adoption.

³⁶ *Id.* at 108-110.

Some prospective adoptive parents, after receiving the child directly from the biological parents, would still decide against adoption and seek the dismissal of the petition. Courts would still leave children in undesirable homes because of a quite proper hesitancy to break up the established relationship and subject the child to a second traumatic experience.

The general proposition that parents have the right to the control of their children and to bring them up as they see fit is not at issue here, though that right is subject to the power of the state to make reasonable rules for the protection of children and their interests. The right of parents permanently to dispose of their children, completely abdicating their rights and escaping their responsibilities, is hardly to be counted as an aspect of the right to control and rear them. In fact, it is precisely the opposite. It is an extinguishment of the right. What biological parents do with their children when they keep them is one thing; what they do when they get rid of them is quite another. Parental renunciation of rights and duties — whether through the independent or agency system — is legalized abandonment; and the only object to the legalization is to control the mode in which the abandonment is accomplished in the interests of the child, and the biological and adoptive parents.

For these reasons and also because of the difficulty of drawing the line between intermediary and parental placements, regulation of independent adoptions cannot stop with measures applicable only to intermediaries. The measures must encompass parental placements as well. This is of course already true of the consent-signing, investigations, reporting and recommending, as well as other requirements in existence in California. It must also be true of the additional devices which sooner or later will have to be authorized if the objectives of this program are to be achieved.

2. It is often suggested that the solution to the problem of independent adoptions lies in the growth of public and private adoption agencies and their pre-emption of the field through their offering of superior services to biological and adoptive parents.³⁷ This result, say or imply some others,³⁸ might eventually be brought about through the prohibition of all independent placements when the agencies have developed sufficient staff and facilities to handle all adoption cases.

Since 1947, private and public adoption agencies have developed in California with great rapidity. Not only have they increased their numbers, but they have greatly increased the number of children placed and they have improved their relative position in the field. In fiscal year 1948 agencies placed 596 children and there were 3759 petitions received in inde-

³⁷ See e.g., *Hearings, supra* note 2 at 84.

³⁸ Note: *Improving the Adoption Process: The Pennsylvania Adoption Act*, 102 U. OF PA. L. REV. 759 at 781 (1954).

pendent adoptions. In fiscal year 1953 agencies placed 1746 and there were 4032 petitions received in independent adoptions. The rate of increase of agency placements, thought it may continue for a time, may not persist indefinitely. But even if it does, for the present and for years to come in the future, sizable numbers of children, will, in all likelihood, be adopted through the independent process. The necessity for contriving adequate controls therefore, cannot be escaped on the ground that the evil will soon go away.

Moreover, there are reasons for allowing independent adoptions to continue, *if the regulation of them can be made effective*. Competition with them has had and is having a salutary effect upon agencies. The agencies are stimulated to improve their efforts and their services by the existence of this alternative machinery. It is at least in part due to this that agencies have been and are working so hard to reduce what is commonly regarded as excessive red tape, to reduce unnecessary delays and to make a good immediate placement rather than waiting a long time in search of an ideal one.³⁹ Perhaps most important of all, state department and county agency standards for determining adoptability of children and suitability of homes — always in need of re-evaluation — benefit from having a source of continuous outside criticism capable of making itself heard.

3. The unmarried mother, as a substantial and critical element in the system of independent placements, deserves special attention. Constructive measures to aid her would reduce many pressures which result in unsatisfactory placement decisions. Such measures should include: (a) available counseling services beginning in the early or middle pre-natal period and continuing through delivery until satisfactory plans for both mother and child are evolved, (b) medical care and hospitalization, (c) sheltered living arrangements for the mother either in family boarding homes or in maternity homes for girls or women who need or desire this service; (d) financial assistance if needed during the period the mother is unable to work. Charles Schottland, former Director of the California State Department of Social Welfare, assessed the situation as follows: "With reference to community services in California in this area, we can make one generalization. services are fragmentary, incomplete and in most areas of the state practically unavailable."⁴⁰

Working along these lines, the conclusion of the Citizens Committee on Adoptions should be implemented. "No child should be deprived of his right to his own family either because of the economic need of his parents or because the community lacks resources for temporary assistance to help his parents maintain a home for him."⁴¹

⁴¹ *Final Report*, at 13 (1953).

³⁹ *Hearings*, *supra* note 2 at 81-82.

⁴⁰ *PROCEEDINGS, INSTITUTE OF UNWED PARENTHOOD* 8 (1952).

4 Aid of the sort just mentioned would bring the community into the independent placement process by a positive program at or before the first dynamic decision, namely, whether to retain the child or surrender it for adoption. The second dynamic decision is the decision—whether reached by the biological parents or in fact by the intermediaries—to place the child with a particular adoptive couple. At or before this point also, the interest and authority of the public need to be intruded. With whatever implementing devices, a pre-placement study seems to be what is required. The present requirement of a state department or county agency investigation, report, and recommendation on the granting of the petition begins only after the petition is filed and seldom ends until six months later or more. It is then not a factor in the making of the placement decision. It constitutes a consideration of whether that decision should be reversed, not made differently, after a new, weighty and often controlling factor has been added. The child has been established in the new home. If an investigation is made before placement it comes at a time when it can be effective in preventing bad placement decisions.

A pre-placement study, to accomplish the desired results, would have to have certain features or be conducted in certain conditions. It would have to apply to all independent placements no matter what the degree of participation in the selection of the adoptive couple by the biological parents or third parties. If this were not true, it would be a mere preferential referral service for intermediaries, in effect removing the present ban of criminal illegality from their activities. The study would be designed to correct evils inherent in the entire independent placement process and not to affect in any way previous laws determining what persons might lawfully engage in that process.

Sufficient time would have to be allowed in which to make the study—sufficient time for counseling and interviewing the biological parents for clearance of the legal status of the child, for determining that the child is a proper subject for adoption, and for judging the suitability of the adoptive home and the fitness of the adoptive parents. A preplacement study plan which does not extend the study to the biological parents and to the child, as well as to the adoptive parents, renders the whole plan ineffective. The experience of the State of Illinois with a requirement for a departmental study before a child is released from a hospital into an independent placement is illustrative.⁴² An official in the Division of Child Welfare of the Department of Public Welfare in Illinois makes the following report regarding this provision. "We are not happy with this law The workers immediately begin the study of the home when the form is received and

⁴² ILL. STATS. c. 111½ § 152 HOSPITAL LICENSING ACT (1953).

within a week the home is approved or disapproved. There is not sufficient time to permit an adequate pre-placement study of the family and if the family meets the minimum standards, their home is approved. The parents of the baby aren't interviewed. The physician or attorney very often does not accept the decision of the agency in regard to the home and it is possible for the mother to carry her baby out of the hospital and to give it to the doctor or lawyer who places it with the family. In situations in which the grounds are not tangible and obvious, we have the placements occurring regardless of our disapproving the home."⁴³

A study of sufficient intensity and extent to encompass all the elements necessary to make it effective would entail so much time that provision would have to be made for a responsible plan for the care of the child during the progress of the study.

A pre-placement study necessarily implies authority on the part of the investigative agency to prevent the placement if the investigation indicates that to be in the best interests of the child. Otherwise, all the old problems of judicial reversal after the child is placed in the home recur. Placement with the adoptive couple would, therefore, have to be forbidden following an adverse judgment by the investigative agency unless and until that judgment is overruled by the court.

A pre-placement study would not altogether displace the present requirement of a state department or county agency investigation after the child is in the home and the petition filed. Since the other elements would already have been covered, that investigation would be confined to the adjustment of the child to the home and the discovery whether conditions have changed or hidden factors emerged.

To do all this, provision must be made for sufficient staff.

5. The function of the courts in adoptions should be clarified and made consistent with prevailing practice in other areas in which administrative operation by a specialized agency has been made dominant by the Legislature. The responsibility of the courts, which has progressively diminished through the years, should still be preserved, but it should now be transformed from that of primary administrator to that of reviewer of administrative activity carried on by others. California has now developed or closely regulates extensive administrative machinery in the field. That machinery consists of licensed and supervised private adoption agencies, of county agencies licensed and supervised as adoption agencies and receiving in addition investigative and administrative powers by delegation from the State Department of Social Welfare, and of the State Department

⁴³ Letter from Illinois Department of Welfare to California Bureau of Adoptions, State Department of Social Welfare, Dec. 14, 1954.

of Social Welfare itself acting directly through its own personnel. The function of this machinery and the object of its creation is to investigate, regulate and control adoptions in such a way that bona fide parental consents will be insured, that children who are placed for adoption will be legally free for adoption, that children placed for adoption will be proper subjects of adoption, and that the adoptive home will be suitable — all so that the best interests of the child can be served. All of this requires investigative staffs, the establishment of standards and the development of techniques. In short it requires specialization. The courts are not equipped for this in terms of time, training, staff and facilities. The administrative function should be carried out exclusively and initial determinations made by the administrative set-up which the Legislature has created for that purpose. When this stage of development has been reached in other areas, the role of the courts has properly become that of review, no longer making determinations administratively and *de novo*, but sitting in judgment on whether the administrators acted within their statutory authority and proceeded upon evidence.

As was long ago judicially observed in California, there is nothing peculiarly judicial about the court's function in adoptions.⁴⁴ They were legislatively assigned that function because of the importance of having some official participation in the process, because the courts have traditionally had a large role in matters affecting children, and in the absence of an administrative agency and specialized knowledge in the field. The courts, the organ of government in the best position to protect the rights of individuals, should always be available to scrutinize the termination or acquisition of parental rights. But that does not mean that they have to serve as administrators. For forty years in California, (in modified form for more than eighty), biological parents have been abdicating their rights and relieving themselves of duties towards their children by relinquishment to adoption agencies without participation by the courts. There is no more reason why the courts should administratively preside over the acquisition of parental rights and duties. The function of passing on petitions for adoption in all cases should be transferred to the State Department of Social Welfare or a licensed county adoption agency. In relinquishments and in adoptions, the courts should be authorized to review the administrative determination and to set it aside if the agency acted beyond the authority conferred on it or if the determination was inadequately supported by findings and evidence. In this way can the advantages of administrative specialization and the judicial protection of individual rights be combined to further the community's interest in parents, biological and adoptive, and in parentless children.

⁴⁴ *In re Stevens*, 83 Cal. 322, 331, 23 Pac. 378, 382 (1890)